Supreme Court, U.S.
FILED

No. _____ 10-384 SEP 17 2010

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In The

Supreme Court of the United States

SHOLAM WEISS,

Petitioner,

v.

STAN YATES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was sentenced *in absentia* while he was a fugitive, and the Eleventh Circuit dismissed his timely appeal from his conviction and sentence with prejudice under the fugitive disentitlement doctrine. Austria and the European Community do not recognize proceedings *in absentia* to 845 years for a white-collar crime and insist that any convicted defendant have a full appeal of conviction and sentence. Austria denied extradition until the United States supplied binding assurances that, if Austria denied extradition on one count of petitioner's indictment, petitioner would receive a re-sentencing on all remaining counts and obtain a full appeal. At the time that the United States gave the assurances, the district court had denied its motion to re-sentence petitioner, the Eleventh Circuit had denied its request to reinstate petitioner's appeal, and the United States had no legal basis for the assurances it provided. When Austria relied on the assurances and extradited petitioner, the United States was unable to obtain a re-sentencing and to secure an appeal for petitioner. Petitioner filed a petition for habeas corpus under 18 U.S.C. § 2241 to seek release or return to Austria.

1. Whether the appropriate remedy in this 18 U.S.C. § 2241 case is petitioner's return to Austria or his release, where petitioner has been in custody (for more than 8 years) in violation of the terms of extradition because he has not received the re-sentencing that Austria was assured would be provided and

QUESTIONS PRESENTED – Continued

federal law precludes a re-sentencing and restored appeal in a § 2241 case.

2. Whether the courts below, in an effort to avoid releasing petitioner or returning him to Austria, exceeded their jurisdiction in a § 2241 case and, contrary to decisions of this Court and virtually every other court of appeals, held that (i) a district court in a habeas corpus § 2241 action may vacate a judgment of conviction and accompanying sentence a decade after they became final, and (ii) a court of appeals may entertain an appeal a decade after it was dismissed with prejudice under the fugitive disentitlement doctrine.

3. Whether, assuming that it had jurisdiction to vacate a decade-old conviction and sentence in a 28 U.S.C. § 2241 action, the district court was required to conduct a full re-sentencing on all counts of a conviction – instead of mechanically vacating one count and leaving all other counts undisturbed – where the United States assured Austria that such a full re-sentencing would occur, Austria has insisted on enforcing its rights under the extradition treaty and the terms of extradition, and the re-sentencing occurs after *United States v. Booker*, 543 U.S. 220 (2005).

PARTIES TO THE PROCEEDING

Petitioner is Sholam Weiss, defendant-appellant below.

Respondent is Stan Yates, Warden, USP Coleman, United States Bureau of Prisons, appellee below.

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PRELIMINARY STATEMENT

This case is unique, involving Austria, the European Court of Human Rights, the United Nations Human Rights Committee, and a decade of proceedings in federal courts. In the year 2000, petitioner was convicted and sentenced *in absentia* to 845 years in prison for a white-collar crime, and the appeal of his conviction and sentence were dismissed with prejudice under the fugitive disentitlement doctrine. Austria, which extradited petitioner to the United States in 2002, has a maximum sentence of 10 years for similar crimes, a maximum that is rarely if ever imposed, does not recognize *in absentia* proceedings, insists that a defendant be present for sentencing, and requires that every defendant be given a full appeal whether or not the defendant is a fugitive.

Relying on its own Constitution and laws, as well as binding laws of the European Union, Austria initially denied the United States' request for extradition and released petitioner. Austria granted extradition only after it received assurances from the United States that if Austria denied extradition on one count, petitioner would get a full re-sentencing (including the right to be present and fully heard) and a plenary appeal of his conviction and new sentence notwithstanding the prior dismissal with prejudice.

Austrian courts, the European Court of Human Rights and the United Nations Human Rights Committee, all reviewed the case and relied upon the United States' assurances. Those assurances were

false representations of federal law and procedure, given without any supporting legal authority to secure petitioner's extradition.

At the time the United States provided the required assurances to Austria, it was aware that it had earlier requested the sentencing court to re-sentence petitioner in 2001 and the court ruled that there was no jurisdiction to conduct a re-sentencing. The United States was equally aware that it had requested the United States Court of Appeals for the Eleventh Circuit to re-open petitioner's appeal upon his extradition, and that Court had refused to do so.

When petitioner was extradited to the United States, the government's motions to re-sentence were denied for lack of jurisdiction. Petitioner had no basis to appeal the denial, since he was not a moving party and no remedy was available to him to seek a re-sentencing.

Because the assurances of a re-sentencing and an appeal were not met, petitioner filed his habeas corpus petition in 2002, alleging that his custody was in violation of the Austria-United States Extradition Treaty and the binding assurances given to Austria by the United States. The United States fought his petition for eight years, during which Austria regularly insisted that the United States obtain a full re-sentencing and plenary appeal for petitioner.

Austria has taken this extradition case so seriously that, while the habeas case was pending in the district court, the (then) Chancellor of Austria

personally wrote an official letter to President George W. Bush in 2008 requesting a commutation of sentence to the 10-year maximum sentence that would have been available in Austria, given that the United States appeared incapable of satisfying the assurances it gave Austria.

The district habeas court, after years of proceedings, eventually found that the United States did in fact give Austria assurances under the extradition treaty and that Austria did in fact rely upon them in extraditing petitioner to the United States. The habeas court was fully aware that the sentencing judge had ruled that there was no jurisdiction to conduct a re-sentencing, and the habeas court was also aware that under this Court's decisions, petitioner was entitled to be returned to Austria or released if the United States was unable to satisfy its treaty obligations.

In an effort to avoid this remedy, the district court assumed jurisdiction in the 28 U.S.C. § 2241 proceeding to vacate the conviction and sentence on the one count on which Austria refused extradition, despite the fact that petitioner did not attack his conviction or sentence on that count and that no claim of a violation of petitioner's trial rights was made in the § 2241 proceeding.

The district court declared – without reference to what Austria was told and relied upon – that the re-sentencing on the one count was sufficient to satisfy the assurances given by the United States to Austria,

and indicated its expectation that the court of appeals would entertain petitioner's appeal of his conviction and sentence.

In doing so, the district court ignored the decisions of this Court and virtually every other court that had considered the scope of § 2241 and assumed a jurisdiction that the sentencing court had found was nonexistent. Moreover, the district court refused to conduct the full re-sentencing that Austria was assured. The court of appeals simply affirmed in an unpublished opinion.[1]

The combination of district court and court of appeals rulings is this: the district court assumed jurisdiction it did not have and provided a remedy that fell far short of what was required under the extradition treaty and binding assurances, and the court of appeals chose to ignore these facts and use an unpublished opinion to assure that no other petitioners or judges in the circuit could rely upon its holding.

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[1] Although petitioner has always been concerned that the district court had no jurisdiction to vacate a conviction and conduct a re-sentencing in a § 2241 case, his counsel indicated to the court of appeals during oral hearing that if, in addition to agreeing to entertain petitioner's full appeal, it remanded the case back for the purpose of providing petitioner with a full re-sentencing of all counts of his conviction, then the assurances given to Austria would be fulfilled. However, although the government indicated during oral argument that it would not object to such a remand, the court of appeals decided against it and never addressed the actual assurances given to Austria by the United States.

The issues presented are unique and go to the heart of the rule of law doctrine. The questions raised by this case include these: May a federal court act contrary to rules and statutes to assume jurisdiction that it lacks in order to avoid providing the remedy that would be required if basic rules of jurisdiction and finality were applied? May federal courts pretend to honor assurances made to another nation by the United States while failing to actually do what the United States assured would be done? And may a court of appeals make petitioner the subject of an adjudication that will never be imposed upon another person by simply using an unpublished opinion to affirm a jurisdictional overreach by a district court and its failure to honor fully the assurances made by the United States in an extradition and to ignore established rules of finality?

PETITION FOR WRIT OF CERTIORARI

Petitioner Sholam Weiss respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is unpublished. App. 1. The *Memorandum Opinion and Order on all Pending Matters* of the

U.S. District Court, Middle District of Florida, Ocala, are unpublished. App. 6 and 14.

JURISDICTION

The Eleventh Circuit entered judgment on April 20, 2010. A petition for rehearing was denied on July 12, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The statutory provisions relevant to this petition are set forth in the appendix, beginning at App. 75.

STATEMENT OF THE CASE

I. Conviction and Dismissal of Appeal

Sholam Weiss's trial before the Honorable Patricia C. Fawsett commenced on February 1, 1999, and continued through November 1, 1999. In October 1999, after a 10-day recess in the trial preceding jury deliberations, Weiss failed to appear, and the trial continued in his absence. Doc. 2, Tab 2.[2] On November 1, 1999, the jury returned a guilty verdict as to Weiss on all counts in which he was named. On

[2] "Doc." refers to the record of the habeas case below.

February 15, 2000, the district court sentenced Weiss *in absentia* over the objection of his counsel, to a term of imprisonment of 845 years, a fine of $123,399,910, and forfeiture of $125,016,656. Doc. 2, Tab 3.

On February 23, 2000, Weiss's counsel filed a timely notice of appeal. On March 17, 2000, the United States filed a motion to dismiss Weiss's appeal "with prejudice" based on the fugitive disentitlement doctrine, and on April 12, 2000, the court of appeals granted that motion. Doc. 2, Tab 4.

II. Extradition Proceedings in Vienna, Austria

On October 24, 2000, Weiss was apprehended in Vienna, Austria, and the United States sought extradition pursuant to the Austria-United States extradition treaty.

Under Article 9 of the treaty, Austria may refuse extradition, or seek assurances that additional proceedings will be available, if Austria considers that the person to be extradited did not have an adequate opportunity to present a defense because of being found guilty *in absentia*. Under Article 11, Austria may refuse extradition if supplemental information that Austria requests is not sufficient to fulfill the requirements of extradition. Article 23 empowers the United States Department of Justice and the Austrian Ministry of Justice to consult directly on individual extradition cases in implementing the treaty. App. 85-87.

In a letter dated May 29, 2001, the Austrian Ministry of Justice requested the United States Department of Justice to provide assurances, under Article 9 and Article 11 of the treaty, that petitioner would receive a full appeal of both his conviction and sentence following extradition. Doc. 180, ex. 11. In a follow up letter dated June 21, 2001, the Austria Ministry stated that it adopted the view of the Regional Court of Vienna that Article 9 applies not only to criminal proceedings, but also to appeal proceedings. Doc. 180, ex. 16.[3]

On June 22, 2001, the United States filed an emergency motion to the Eleventh Circuit Court of Appeals to reinstate Petitioner's appeal, effective upon Weiss's extradition. The Eleventh Circuit denied that motion on June 29, 2001 without opinion. Doc. 180, exs. 17, 21.

On September 11, 2001, the Regional Court of Vienna ruled that, to protect petitioner's rights under the European Convention on Human Rights, Article 2 of the 7th Protocol (App. 89), protecting the right of

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[3] The Austrian Ministry also raised questions as to whether petitioner had been sentenced in absentia, which is not permissible under Austrian and European law. Ultimately, the Ministry did not have to explore this because the United States assured Austria that, in order to obtain an appeal, petitioner would have to have a complete re-sentencing. Indeed, the United States twice sought a re-sentencing from Judge Fawsett, who ruled that she was without jurisdiction to provide one. Motions, Doc. 180, exs. 59 & 60; Judge Fawsett Order, App. 46. Discussed *infra*.

appeal, extradition was not permissible absent assurances from the United States that Weiss would receive an appeal of his conviction and sentence.

The Austrian Supreme Court reversed the Regional Court's September 11, 2001 decision on jurisdictional grounds, ruling that the decision whether extradition should be denied or granted on the basis of Article 2 of the 7th Protocol to the European Convention of Human Rights was "exclusively" within the authority of the Minister of Justice to determine. Doc. 180, ex. 39 at 10.

On May 10, 2002, the Ministry authorized petitioner's extradition on all counts except count 93, which the Ministry denied extradition, but issued a stay of extradition that same day. Doc. 180, exs. 42, 45. In authorizing Weiss's extradition, the Ministry relied on the representations in a letter from the United States Department of Justice, dated February 8, 2002 (App. 97), stating that petitioner would receive a re-sentencing and an appeal if so extradited. Doc. 180, ex. 44. The Ministry nevertheless stayed the authorization of extradition because petitioner's extradition was being reviewed by the European Court of Human Rights ("European Court").

The European Court requested Austria to:

> . . . submit an unequivocal declaration from the United States Department of Justice whether their statement of 8 February means only that, upon his extradition, the applicant will only have a re-sentencing

> procedure or whether he is guaranteed a full appeal against his conviction on points of fact and law.

Doc. 180, ex. 46.

In response to the request for an unequivocal declaration, the Department of Justice sent a letter to Austria dated May 14, 2002, to "confirm and restate" the contents of the February 8, 2002 letter. This letter declared that if Weiss were extradited on all counts of the conviction except count 93, the presiding United States judge would be "required" to re-sentence him on the remaining counts and that a re-sentencing would permit him to appeal his convictions on all remaining counts as well as the new sentence on those counts. App. 95.

On May 15, 2002, the Ministry sent a letter to the European Court, expressing its trust, based on the May 14, 2002 letter, that a "full appeal against both culpability and sentence" would be available to petitioner upon extradition. Doc. 180, ex. 51. On June 7, 2001, the Ministry filed a legal brief to the Austrian Administrative Court, defending the extradition, arguing that the United States' letters were international binding declarations given under the extradition treaty and protecting petitioner's right to a re-sentencing on all counts of his conviction for which he is extradited and a full appeal of his conviction and new sentence. Doc. 180, ex. 58 at 12.

On June 9, 2002, Austria extradited petitioner, relying on the binding nature of the United States'

representations that Weiss would receive a re-sentencing on all counts except count 93 and a full appeal of his conviction and new sentence.

III. Government Motions for Re-sentencing

The government filed a motion for re-sentencing with the sentencing judge, the Honorable Patricia Fawsett, on June 21, 2002 (Doc. 180, ex. 59), which was denied without prejudice. The government filed a "renewed" motion for re-sentencing on July 17, 2002. Doc. 180, ex. 60. On August 1, 2002, Judge Fawsett denied the government's motion, finding that the court had no statutory or inherent authority to modify a sentence that had already become final. App. 46. The government appealed the decision, but withdrew the appeal after the Solicitor General refused to authorize the appeal, resulting in the appeal being dismissed with prejudice on January 8, 2003.

IV. Habeas Proceedings

On July 17, 2002, petitioner filed a petition for writ of habeas corpus in the Middle District of Florida (Ocala), pursuant to 28 U.S.C. § 2241. The petition alleged that to effectuate the extradition, the United States assured Austria that by denying extradition on count 93, petitioner would receive a full re-sentencing on the remaining counts, followed by a full appeal of his conviction and new sentence. The petition further alleged that those assurances were false, given in bad faith, and cannot be fulfilled, and requested as a remedy, his release and return to

Austria. Doc. 1 at 1-2, 15-19; Doc. 22 at 1; Doc. 88 at 27-29, *generally*, Doc. 180.

After years of proceedings, including an initial denial of the habeas petition and FED. R. CIV. P. 60(b) motion, and then the granting of petitioner's motion for reconsideration, the United States sent a diplomatic note to Austria, dated March 6, 2008, requesting it to provide an answer for the district court on whether the United States gave assurances to Austria that petitioner would receive a full appeal of his conviction and sentence and whether Austria relied on those assurances in extraditing him. Doc. 180, ex. 85.

On June 18, 2008, Austria responded by diplomatic note, stating that the extradition of petitioner was "effectuated" on the basis of United States' representations that, if petitioner were extradited on the rule of specialty, he would be re-sentenced and that this would "inevitably" lead to a "full appeal." App. 92.

On October 22, 2008, the Chancellor of Austria sent a letter to then-President George W. Bush, protesting that "the Republic of Austria granted the extradition of Mr. Weiss, trusting in assurances from the United States that Mr. Weiss would receive *both a re-sentencing* and a full appeal of his conviction and sentence." (Emphasis added). App. 90.

After finding that binding assurances were made by the United States to Austria, the district court issued its *Memorandum Opinion* on December 15, 2008, containing its findings and intended course of action. App. 14. On July 16, 2009, the district court

issued its *Order on all Pending Matters* vacating petitioner's 10-year sentence associated with count 93, but it did not (a) conduct a re-sentencing on the remaining counts; (b) make a guideline determination; or (c) consider 28 U.S.C. § 3553(a) factors. App. 6. Instead of an 845-year sentence, petitioner was left with an 835-year sentence imposed by the *Amended Judgment*, entered on the same day as the *Order*. App. 55. In its *Order*, the district court stated its intention that the new judgment would satisfy the extradition treaty and terms of extradition by enabling petitioner to appeal his conviction and sentence without prejudice arising from the earlier dismissal of his appeal under the fugitive disentitlement doctrine. App. 9.

V. Appeal to the Eleventh Circuit

Petitioner appealed to the Eleventh Circuit Court of Appeals, which affirmed the district court's ruling on April 20, 2010, in an unpublished opinion with little legal reasoning, but implicitly holding that to satisfy a treaty obligation, a district court in a § 2241 habeas proceeding may vacate a conviction and sentence to reinstate an appeal that had earlier been dismissed with prejudice under the fugitive disentitlement doctrine. App. 1. The court of appeals denied petitioner's request to remand back for a full re-sentencing, despite: (a) the government's statement in oral argument that it would not object to such a remand; (b) its concession that it had never represented to Austria that petitioner would receive anything less than a full re-sentencing; and (c) the

agreement of the parties during oral argument that a recalculation under the guidelines, without any other considerations, would result of a range of 324 to 405 months.

Petitioner filed a petition for rehearing on the single issue of the district court's denial of a re-sentencing on all counts but count 93 (but preserving all other claims), which was denied on July 12, 2010. App. 73.

REASONS FOR GRANTING THE PETITION

I. The Holdings of the Lower Courts That a District Court May Vacate a Decade-Old Conviction and Sentence in a Habeas Corpus Action Brought Under 28 U.S.C. § 2241 Is In Conflict With Decisions of This Court, Other Courts of Appeals and The Plain Language of Relevant Statutes, All of Which Make Clear that a § 2241 Petition is Limited to Challenging the Execution of Sentence, Not the Imposition of Sentence

A. Virtually every Circuit has found that § 2241 is limited to challenging the execution of sentence, not the imposition of sentence, a principle that the Eleventh Circuit has recognized in the past but from which it created an unprecedented exception in this case

Antonelli v. Warden, 542 F.3d 1348 (11th Cir. 2008) noted that "the cases in this circuit consistently

recognize that prisoners who seek to collaterally attack a conviction or sentence must satisfy the procedural requisites of § 2254 or § 2255, however their petition is captioned . . . " *Id.* at 1351. Petitioner has not claimed that he can satisfy the 1-year time limit procedural requirement, nor has he alleged that his sentence was *imposed* in violation of the Constitution or laws of the United States. Thus, petitioner did not bring a 28 U.S.C. § 2255 motion.

Antonelli further noted the widespread agreement among the circuits that § 2241 is limited to challenging the execution of sentence – custody – rather than the validity of the sentence. *Id.* at 1350-1352. Indeed, it is for this reason that the "gatekeeping" requirements of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to § 2241. *Id.*

Virtually all other circuits concur that § 2255 is used to attack the *imposition* of sentence, whereas § 2241 is restricted to challenging the *execution* of sentence. *Chambers v. United States*, 106 F.3d 472, 474-475 (2d Cir. 1997) (*citing Neary v. United States*, 998 F.2d 563, 564 n.1 (8th Cir. 1993); *United States v. Weathersby*, 958 F.2d 65, 66 (5th Cir. 1992)); *Zayas v. INS*, 311 F.3d 247, 256-257 (3d Cir. 2002) (noting that Congress did not intend to apply the gate-keeping provisions of AEDPA to § 2241 because it is not used to attack a sentence or conviction); *Valona v. United States*, 138 F.3d 639, 694 (7th Cir. 1998) (*citing United States v. Addonizio*, 442 U.S. 178, 185-186, 99 S. Ct. 2235, 2240-2241 (1979)).

Both the district court and the Eleventh Circuit sought to create an exception from this well-established law, but neither court could find statutory or decisional authority to support the exception. The district court assumed jurisdiction it lacked in an effort to avoid the true state of affairs: namely, the United States made assurances to Austria without any basis in law for doing so. Federal courts are courts of limited jurisdiction, and there is no general jurisdiction to fix Executive errors.

B. The district court had no statutory authority under § 2241 or § 2255 to vacate petitioner's conviction

In affirming the district court, the Eleventh Circuit noted:

> The district court held that the rule of specialty required vacating Count 93 and that the resulting re-entry of judgment would permit Weiss to appeal his new sentence and original conviction. *United States v. Phillips*, 225 F.3d 1198 (11th Cir. 2000) (establishing procedure for vacating judgment and reimposing sentence in a 28 U.S.C. § 2255 proceeding to provide defendant with right to an out-of-time appeal). Specifically, the district court found that the communications by the United States required only the elimination of Count 93 and a full appeal of his conviction and the new sentence without Count 93. This, the district court found, would fulfill

> the obligations of the United States under the rule of specialty.

App. 43-44.

United States v. Phillips involved the constitutional right of effective assistance of counsel to file a timely notice of appeal – a remedy within the statutory authority of § 2255. However, petitioner filed under § 2241 to challenge his custody by the United States in violation of a treaty, a remedy within the statutory authority of § 2241, and the only remedy petitioner believed was available. On petitioner's argument that the district court had no authority under § 2241 to vacate his conviction, the court of appeals noted only: "Whether construed under § 2255 or § 2241, the district court had jurisdiction to issue the relief it did given the unique facts of this case." App. 4 n.3.

The unique facts, of course, are the treaty obligations created by the United States' assurances during extradition proceedings, after petitioner's conviction was made final and his sentence imposed. Although § 2255 has clear language allowing a court to "set aside or correct the sentence," petitioner did not have a sentence that was *imposed* in violation of the Constitution or laws of the United States as specified by that statute. *United States v. Addonizio*, 442 U.S. 178, 179, 99 S. Ct. 2235, 2237 (1979) (denying a collateral attack under § 2255 where the claim is against the decision of a parole board, and not against the lawfulness or constitutionality of the imposition of sentence). And although § 2241 allows a petitioner to

challenge his custody in violation of a treaty, it does not expressly empower a court to set aside or correct a sentence which can only be done pursuant to § 2255.[4]

C. The district court had no inherent authority to modify a sentence under § 2241 or § 2255

Judge Fawsett denied the government's renewed motion to re-sentence petitioner on August 1, 2002, relying on the statutory language of 18 U.S.C. § 3582(c), which provides that a district court "may not modify a term of imprisonment once it has been imposed" except upon limited circumstances (not applicable to petitioner's case). App. 46.[5]

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[4] A narrow exception to the use of § 2241 to attack a sentence or conviction is through the "savings clause" of § 2255. *United States v. Triestman*, 124 F.3d 361 (2d Cir. 1997) allowed the use of § 2241 to challenge a sentence and conviction through the savings clause where there was a "serious constitutional question." *Id.* at 377. However, every other circuit has rejected this ruling and consider § 2255's savings clause applicable only where the petitioner establishes both "actual innocence and retroactivity." *Reyes-Requena v. United States*, 243 F.3d 893, 903 (5th Cir. 2001) (collecting cases). The "core idea" underlying "the actual innocence factor" is that a petitioner is imprisoned "for conduct that was not prohibited by law." *Id.* Even under *Triestman*, petitioner would not be permitted a re-sentencing because no constitutional defect was alleged in the § 2241 petition.

[5] Judge Fawsett quoted heavily from *United States v. Bakhtiar*, 964 F. Supp. 112 (S.D.N.Y. 1997), a case factually

(Continued on following page)

In petitioner's *habeas* proceedings, Judge Hodges acknowledged Judge Fawsett's decision, but found that her decision was pursuant to "the administration of the criminal prosecution," whereas petitioner's case involved "the remedies that might be available in a collateral habeas proceeding under 28 U.S.C. § 2241." *Memorandum Opinion,* App. 38.

However, the Eleventh Circuit, which had previously found that a district court has no "inherent authority" to re-sentence a defendant absent statutory authority, *United States v. Diaz-Clark*, 295 F.3d 1310, 1317 (11th Cir. 2002), found inherent authority in this case by fiat – i.e., without any statutory or decisional basis to support the claim of authority. In *Diaz-Clark*, the district court re-sentenced the defendant to correct a Sentencing Guidelines grouping error in the original sentence. *Id.* at 1314. The Eleventh Circuit ruled that even if the sentence was in error, the district court had no inherent power to modify a sentence outside of the statutory limitations of 18 U.S.C. § 3582. *Id.* at 1319.[6] In so ruling, it noted the widespread agreement among other circuits, as

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similar to petitioner's, where the rule of specialty was imposed after the defendant's conviction had already been made final. In most specialty cases, the rule of specialty is imposed before a defendant's trial, where the prosecutor has broad authority to enforce it. App. 52, 53.

[6] It noted the availability of § 2255 to correct an error in the *imposition* of a sentence after the 7-day period in FED. R. CRIM. P. RULE 35(c) has elapsed (which, of course, is not applicable to this case). *Id.* at 1316.

well as this Court, *citing Carlisle v. United States*, 517 U.S. 416, 426, 116 S. Ct. 1460, 1466 (1996) ("[w]hatever the scope of this 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.") *Diaz-Clark* at 1317-1318. *See also United States v. Washington*, 549 F.3d 905, 914-917 (3d Cir. 2008) (no inherent power to re-sentence even where fraud is involved).

D. *Boumediene v. Bush*, upon which the district court relied for authority under § 2241, does not expand the authority of a court under § 2241 to vacate a conviction already made final

The district court found that the developed jurisprudence of this Court culminating in *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008), makes clear that a habeas court has a "full arsenal of remedies" to correct unlawful detentions short of ordering release where a lesser remedy is available. *Memorandum Opinion*, App. 39. Although the district court's general reading of *Boumediene* may be correct, such remedies in a § 2241 proceeding do not include vacating a conviction and sentence to satisfy treaty obligations. *Boumediene* concerns the need for a district court, entertaining a § 2241 habeas petition, to correct errors made by a Combat Status Review Tribunal (CSRT) in determining whether a person is an

"enemy combatant."[7] Essentially, *Boumediene* held that a court in a § 2241 habeas proceeding must have the power to correct errors in the government's decision to hold a person – the exclusive role of § 2241. In this respect, *Boumediene* is no different from other § 2241 habeas cases that review the decision of a parole board to deny parole for an inmate, or the decision of the government to detain or deport an alien. The case does not even remotely concern the authority of a court under § 2241 habeas to vacate a sentence already made final.

II. The Court of Appeals' Decision to Ignore the Fact that It Had Dismissed Petitioner's Appeal with Prejudice in 2000 and Had Refused to Reopen Petitioner's Appeal in 2001 in Order to Assist the Executive in Satisfying Assurances Demanded by Austria as a Condition of Extradition – When the Executive Lacked Authority to Make Those Assurances – Conflicts with the Traditional Rules of Procedural Default and Finality Established by this Court

A. An appeal properly dismissed pursuant to the fugitive disentitlement doctrine is *res judicata*

As noted in the above *Statement of the Case*, on March 17, 2000, the United States filed a motion to

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[7] This determination is significant because a person designated as an enemy combatant may be held until hostilities are over, which may be never.

dismiss petitioner's appeal "with prejudice" based on the fugitive disentitlement doctrine, and on April 12, 2000, the court of appeals granted that motion. Doc. 2, Tab 4. The court of appeals also denied the government's emergency motion on June 29, 2001 to reinstate petitioner's appeal (effective upon extradition to satisfy Austria's request for assurances).[8]

As noted *supra*, the court of appeals cited only one case, *United States v. Phillips*, 225 F.3d 1198 (11th Cir. 2000), in support of its ruling that the vacating of one count of petitioner's conviction may cure the fugitive disentitlement doctrine. App. 3, 4. *Phillips* concerns the dismissal of an out-of-time appeal for lack of jurisdiction. It is established law that when a notice of appeal is filed out-of-time due to ineffective counsel, a district court may cure the dismissal through § 2255 by vacating and reinstating the conviction. This procedure restarts the clock and gives the court of appeals jurisdiction to entertain the appeal and protect the constitutional right of effective assistance of counsel.

However, there is no claim that petitioner's appeal was dismissed as a result of a constitutional violation, or that it was otherwise improperly dismissed. Further, petitioner's appeal was properly filed on time, and was not dismissed for lack of jurisdiction. It was dismissed with prejudice under

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[8] *See* United States' "emergency motion to reinstate Weiss' appeal effective upon Weiss' extradition to the United States . . . " (Doc. 180, ex. 17); and this Court's denial (*Id.* at ex. 21).

the fugitive disentitlement doctrine. Petitioner's appeal was forfeited and the dismissal is *res judicata*. Restarting the clock is therefore not a cure.

To avoid the proper remedy under § 2241 for a person in custody in violation of a treaty (discussed *infra*), the court of appeals created an exception from well-established law in the Eleventh Circuit that an appeal dismissed with prejudice is *res judicata* and results in a loss of all claims that might have been heard on the appeal. *See Lynn v. United States*, 365 F.3d 1225, 1243-1244 (11th Cir. 2004) (traditional rules of procedural default apply to appeals dismissed on the basis of the fugitive disentitlement doctrine); *United States v. Fiallo-Jacome*, 874 F.2d 1479 (11th Cir. 1989) (*citing* the fugitive disentitlement doctrine as authority that claims not raised in a first appeals brief are "waived" and cannot be raised in a later reply brief, re-hearing motion, or § 2255 motion, regardless of the merits of the claim).

In creating an exception from basic principles of finality, the court of appeals ignored the teachings of this Court regarding procedural default:

> The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the *finality of judgments* (Emphasis added).

Massaro v. United States, 123 S. Ct. 1690, 1693 (2003), *cited in Lynn*, 365 F.3d at 1234, n.17.

B. This Court has ruled that treaty obligations may not supercede traditional rules of procedural default

Both this Court and the Eleventh Circuit make clear that an extradition treaty is a part of federal law, and that a federal court has jurisdiction under § 2241 to enforce treaty obligations. *United States v. Puentes*, 50 F.3d 1567, 1573-1575 (11th Cir. 1995); *United States v. Rauscher*, 119 U.S. 407, 418-419, 7 S. Ct. 234, 239-240 (1886). But enforcement, as Judge Fawsett recognized, must be in accordance with federal rules and statutes. Contrary to the court of appeals' affirmance of the district court's finding that § 2241 may be used to reinstate an appeal to satisfy treaty obligations (*District Court Order on all Pending Matters*, App. 9), this Court has explicitly ruled that treaty obligations may not supercede traditional rules of procedural default. *Breard v. Greene,* 523 U.S. 371, 375 (1998) *(per curiam).*

III. The Appropriate Remedy for the Non-fulfillment of United States' Obligations Under the Extradition Treaty and Terms of Extradition is Petitioner's Release and Return to Austria, as Decided by this Court in *Johnson v. Browne* and Supported by Recent Case Law and International Practice

A. *Johnson v. Browne* provides the proper remedy when United States' assurances regarding the rule of specialty cannot be fulfilled

Johnson v. Browne, 205 U.S. 309, 27 S. Ct. 539 (1907), ruled that if assurances given under an

extradition treaty cannot be fulfilled, the United States is required to order the extradited person's return to the place from which that person was extradited. As argued above, the district court had no jurisdiction to vacate petitioner's conviction on count 93, nor does the court of appeals have jurisdiction to reinstate petitioner's appeal. In affirming the district court's ruling, the court of appeals ignored the appropriate remedy this Court has established for cases such as petitioner's, and has instead affirmed the district court's *partial* fulfillment of the United States' assurances done contrary to the rules and laws of the land.

In *Johnson v. Browne*, Johnson was convicted of conspiracy, released on bail pending appeal, and failed to surrender himself after his conviction was affirmed. Shortly thereafter, he was found in Canada and the United States sought his extradition. Canada refused extradition because the offense of conviction was not within the United States' extradition treaty with Canada. The United States filed new charges against him, and Canada extradited him on the new charges. The United States did not try the defendant on the new charges, but imprisoned him on the prior conviction, as to which Canada had denied extradition. Johnson filed a habeas corpus petition. The trial court granted the petition and ordered that the defendant be discharged. The Supreme Court affirmed.

The *Johnson* Court stated that an extradited person

> . . . shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up; and that, if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

Id. at 318 (*quoting United States v. Rauscher*, 119 U.S. 407, 424, 7 S. Ct. 234, 243 (1886)).

This Court further stated that:

> While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense, on the ground that such offense was not one covered by the treaty.

Johnson, 205 U.S. at 321, 27 S. Ct. at 543.

To achieve compliance with the rule of specialty, based on the binding assurances it gave to Austria, the United States is required to provide petitioner

with a genuine re-sentencing on all counts but 93 and a full appeal as to his conviction and sentence. Contrary to the ruling of the court of appeals, the law of the land does not provide a means to fulfill these assurances. This constitutes a breach of the treaty, and the remedy for this breach of treaty under *Johnson* is for Petitioner to be released if not returned to Austria.

B. Eleventh Circuit law follows *Johnson*

In other cases, the Eleventh Circuit has adopted the remedy provided in *Johnson*, but in this case the court of appeals created the third "special exception" from basic principles of jurisdiction, finality and remedies. Previously, the court of appeals had written with respect to the rule of specialty the following:

> This principle stands for the proposition that the requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he or she was surrendered by the requested state or else must allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.[9]

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[9] Or "punish." Article 19 of the extradition treaty with Austria, governing the rule of specialty, states that a person "may not be detained, tried, punished, or subjected to any other restriction of his personal liberty," except for the offenses upon which extradition was granted. Doc. 180, ex. 9.

United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988) (*quoting* M. Bassiouni, *International Extradition: United States Law and Practice* vol. 1, ch. 7, sec. 7, pp. 359-360 (2d rev. ed. Nov. 1987)); *see also United States v. Gallo-Chamorro*, 48 F.3d 502, 504 (11th Cir. 1995) (same).

Petitioner was extradited on the basis of assurances that he would *not* be punished on his original sentence imposed on February 15, 2000, but instead would be punished on an entirely new sentence imposed on counts 1-92 by a full re-sentencing, followed by a full appeal of his conviction and new sentence.

Absent a full re-sentencing, followed by a full appeal, petitioner's punishment would not be in compliance with the rule of specialty and terms of extradition, and he must be given the "opportunity to leave the prosecuting state to which he or she had been surrendered." *Herbage* at 1465. The exception created by the court of appeals for this case, and only this case -- by upholding jurisdiction and ignoring the prior dismissal of an appeal with prejudice -- is unsupported by statute or decisional law.

C. This Court looks to the practice of nations in interpreting the rule of specialty

Although international law is often irrelevant in interpreting United States law, the United States Supreme Court has specifically noted the relevancy of

the "practice of nations with regard to extradition treaties" in interpreting the rule of specialty. *United States v. Alvarez-Machain*, 504 U.S. 655, 667, 112 S. Ct. 2188, 2195 (1992), *citing United States v. Rauscher*, 119 U.S. 407, 7 S. Ct. 234 (1886).

In *Einhorn v. France,* European Court of Human Rights, Application No. 71555/01,[10] the court found that because Mr. Einhorn, a United States' citizen, was extradited to the United States with assurances that he would get a new trial and be punished on the basis of a new conviction and sentence, there would be a violation of the rule of specialty if a new trial were not given, and France would be entitled to ask the United States for his release. *Id.* at ¶ 30, *noting* the binding nature of extradition treaties under Article VI of the United States Constitution and under *United States v. Rauscher.*[11]

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[10] Decisions of the European Court of Human Rights are available in English online at http://echr.coe.int/echr/en/hudoc.

[11] The Court may take judicial notice that Einhorn was indeed given a new trial. *Commonwealth v. Einhorn*, 2006 Pa. Super. 322, 911 A.2d 960 (Pa. 2006).

IV. If the Lower Courts Were Correct that a District Court May Assume Jurisdiction Under § 2241 to Vacate a Judgment of Conviction and Re-Sentence a Petitioner, They Were in Conflict with Decisions of this Court and in Violation of the Extradition Treaty and United States' Assurances in Failing to Conduct a Full Re-Sentencing

A. The United States gave Austria assurances that petitioner would receive a full re-sentencing on all counts for which he was extradited, not merely a vacating of 10 years associated with count 93

In the May 14, 2002 letter to Austria, the United States Department of Justice[12] declared: " . . . the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition [of specialty] . . . ," and that Weiss would be permitted to "appeal the guilty verdict on counts One through Ninety-Two, *as well as the new sentence imposed on those counts*." (Emphasis added). App. 95, 96. The February 8, 2002 letter stated: "To secure compliance with the rule of specialty, the United States Attorney's Office for the Middle District of

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[12] Article 23 of the United States-Austria Extradition Treaty empowers the Department of Justice and Austrian Ministry of Justice to communicate directly on individual cases in furtherance of the treaty. App. 87.

Florida would file a motion in the U.S. District Court for the Middle District of Florida requesting that the court re-sentence Mr. Weiss, *considering only those Counts of the conviction for which he is extradited from Austria.*" (Emphasis added). App. 98.

Austria's understanding at the time of extradition was, and remains today, that upon extradition petitioner would receive a full re-sentencing on all counts but count 93, and that the proceeding would not be *in absentia* (allowing him to make arguments and present evidence for a reduced sentence on those counts). This is a significant right, considering his 845-year sentence was primarily for money laundering, a conviction which under Austrian law, he would receive no more than 10 years.

The issue of whether Petitioner would receive a simple reduction of sentence versus a full re-sentencing on all counts (for which he was extradited) was raised during extradition proceedings before the Austrian Administrative Court. There, the Austrian Ministry of Justice assured the court that petitioner would not only have only one count removed, but would have a re-sentencing on all his counts, commenting that this right was protected by the "binding international declarations" given by the United States. Doc. 180, ex. 58 at 12.

The United States conceded at oral argument before the Panel that there is no evidence to contradict the assurance that the re-sentencing would be on all counts. Indeed, the United States promised

Austria in its February 8th letter the following: "The United States would maintain that this re-sentencing is both required and appropriate *before any court considering this matter*." (Emphasis added). App. 98, 99. When the court asked the government if it would object to a remand for a full re-sentencing, the government, bound by its promise, indicated that it would not. Further, the parties agreed during oral argument that a re-calculation of petitioner's sentence under the federal guidelines, even without a full re-sentencing, would result in reduction from an 845-year sentence to a range of 324-405 months.[13]

B. Austria has not waived the United States' assurance for a full re-sentencing

Petitioner's rights under the extradition treaty and terms of extradition are derived from Austria's rights. *United States v. Puentes*, 50 F.3d 1567, 1574 (11th Cir. 1995). Those rights are enforceable even if the extraditing country (Austria) does not protest to

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[13] In this regard, it should be noted that the district court chose not to apply the federal guidelines when vacating count 93 because of its mistaken understanding stated in its *Order* that the guidelines were not applied (App. 10), when in fact the *Amended Judgment* itself clearly states that the guidelines were applied. App. 56. The district court erred in not complying with 28 U.S.C. § 3553(a), and this Court's decisions, requiring that a district court make a guideline determination, consider all statutory factors in imposing sentence, and consider how vacation of a conviction on one count may affect the appropriate sentence on remaining counts.

enforce those rights. *Id., citing United States v. Alvarez-Machain*, 504 U.S. 665, at 667, 112 S. Ct. 2188, 2195 (1992). Petitioner's rights may only be waived if the extraditing country, Austria, expressly waives those rights. *Puentes* at 1575. Austria has not done so.

The same communications the district court relied on to find that the United States assured Austria that petitioner would receive a full appeal (the above cited letters of February 8 and May 14, 2002) also assured Austria that petitioner would receive a full re-sentencing. However, in deciding that eliminating the sentence on count 93 would satisfy Austria, the district court ignored these communications and clear documentation revealing Austria's understanding that petitioner would receive a full re-sentencing on all counts but 93. Instead, the district court relied solely upon Austria's diplomatic note of June 18, 2008, which responded to a United States diplomatic note that asked only about an appeal and not about a re-sentencing. Austria's reply note stated that "the imposed sentence will be newly assessed." App. 93.

This reflects Austria's consistent understanding that there would be a genuine re-sentencing on the entire imposed sentence – on all counts – in which petitioner would be able to participate. The later diplomatic letter of December 22, 2008 from (then) Austrian Chancellor Gusenbauer to (then) President George W. Bush stated in plain English that the United States assured a "re-sentencing." App. 90.

C. Because the district court did a re-sentencing, it was required to conform to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005)

There is no doubt that the district court believed it was doing a re-sentencing of petitioner, even though the court was determined to change the sentence on only one count despite the assurances given to Austria. The district court ignored 18 U.S.C. § 3553(a), despite the fact that since the decision in *Booker* it is clear that a district court must consider all of the factors set forth in the statute, do a guideline calculation, and only then decide what sentence to impose.

In this case, the district court ignored both the guidelines and the statute in imposing a sentence, and the court of appeals affirmed. The district court's sentencing violated *Booker*, and the failure of the court of appeals to insist upon procedural compliance is inconsistent with *Rita v. United States*, 551 U.S. 338 (2007).

CONCLUSION

For the above stated reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13777

D. C. Docket No. 02-00204-CV-OC-10-GRJ

SHOLAM WEISS,

Petitioner-Appellant,

versus

STAN YATES,
Warden, FCC Coleman,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 20, 2010)

Before BIRCH and BARKETT, Circuit Judges, and BUCKLEW,* District Judge.

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* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

In 1999, Sholam Weiss was convicted of racketeering, money laundering, fraud and other offenses arising out of the failure of the National Heritage Life Insurance Company. Before the jury concluded its deliberations, Weiss fled the country. He was found guilty of the 78 counts charged, and was sentenced with only his lawyer present, in 2000, to 845 years in prison.[1] In Weiss's absence, his counsel filed an appeal. However, under the fugitive disentitlement doctrine, which permits courts to dismiss a fugitive's appeal and refuse to reinstate it after post-sentencing recapture, *Ortega-Rodriguez v. United States,* 507 U.S. 234, 239-42 (1993), Weiss's appeal was dismissed. Eventually Weiss was arrested in Austria, and extensive and lengthy proceedings ensued pertaining to the request by the United States to extradite Weiss.[2] Ultimately, Weiss was extradited with the condition that his sentence for Count 93 would not be enforced be vacated.

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[1] At the time of sentencing, the Guidelines were mandatory, and the sentences for each count were imposed according to the mandatory guidelines. Under the terms of the district court order at issue in this case, the sentence has been reduced to 835 years imprisonment.

[2] These proceedings included the exchange of many communications between the United States and Austria, various actions by the Executive branch of the Austrian government, lawsuits filed by Weiss in various Austrian courts and in the European Court of Human Rights, some of which were later dismissed by Weiss.

Upon his return to the United States, Weiss filed a Petition pursuant to 28 U.S.C. § 2241, which is the subject of this appeal. In that Petition, Weiss argues that the United States deliberately misled Austrian authorities to believe that, in addition to vacating the sentence on Count 93, Weiss would be re-sentenced and permitted a full appeal of his criminal conviction and new sentence. Weiss argues that, by not giving him a full re-sentencing and appeal, the United States deceived Austria into extraditing him and violated the terms of the extradition. This deception, Weiss argues, violates the "rule of specialty," which limits a requesting state's prosecution or punishment of the extradited person to the specific terms of the extradition. *United States v. Rauscher,* 119 U.S. 407 (1886); *United States v. Puentes,* 50 F.3d 1567 (11th Cir. 1995); *Gallo-Chamorro v. United States,* 233 F.3d 1298 (11th Cir. 2000).

The district court held that the rule of specialty required vacating Count 93 and that the resulting re-entry of judgment would permit Weiss to appeal his new sentence and original conviction. *United States v. Phillips,* 225 F.3d 1198 (11th Cir. 2000) (establishing procedure for vacating judgment and reimposing sentence in a 28 U.S.C. § 2255 proceeding to provide defendant with right to an out-of-time appeal). Specifically, the district court found that the communications by the United States required only the elimination of Count 93 and a full appeal of his conviction and the new sentence without Count 93.

This, the district court found, would fulfill the obligations of the United States under the rule of specialty.[3]

The government did not cross-appeal the district court order and, at oral argument, represented to us that it does not and will not oppose granting Weiss a full appeal of his conviction and the recalculated sentence without Count 93. Assuming the communications constitute conditions under the rule of specialty, the government argues that the district court did not err in finding that the communications do not require a full re-sentencing *on all counts* but, rather, require only the elimination of the sentence for Count 93.[4]

Having reviewed the communications at issue, we find no clear error in the district court's determination that the representations made by the United States to Austria called only for the elimination of the sentence for Count 93, the recalculation of his

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[3] Weiss argues that the district court did not have the authority to vacate his prior sentence and judgment, re-sentence him, and enter that sentence as the new judgment because such a remedy is available only under § 2255. Therefore, Weiss reasons, the only remedy available is his release from custody. At one juncture, the district court did consider construing this petition under § 2255 rather than § 2241. Whether construed under § 2255 or § 2241, the district court had jurisdiction to issue the relief it did given the unique facts of this case. *Phillips*, 225 F.3d 1198.

[4] The government also argues that its letters do not constitute a condition under the rule of specialty. For the reasons outlined above, we need not address this contention.

sentence without that count, and the resulting opportunity for a full appeal of his conviction and sentence. We note that the appeal of Weiss's conviction and resentencing has been docketed in this court and stayed pending the resolution of this case. Having resolved the district court's authority to provide for resentencing and a full appeal of his conviction and sentence without Count 93, Case No. 09-13778 can now proceed.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHOLAM WEISS,

Petitioner,

-vs-

Case No.
5:02-cv-204-Oc-10GRJ

STAN YATES, WARDEN
FCC COLEMAN,

Respondent. /

ORDER ON ALL PENDING MATTERS AND DIRECTING ENTRY OF JUDGMENT

Prior to December 15, 2008, this case was pending before the Court on remand from the Court of Appeals to consider the Petitioner's motion (Doc. 57) to set aside an earlier order and judgment denying the petition in its entirety. On that date – December 15, 2008 – the Court filed a Memorandum Opinion (Doc. 168) concluding that a certificate should issue to the Court of Appeals suggesting that a further remand be made to permit this Court to grant the Petitioner's motion to set aside the former judgment in order to allow the Petitioner a limited opportunity to amend his petition to include a specifically described, alternative prayer for relief.[1]

[1] The Memorandum Opinion defined the alternative prayer for relief as one " . . . seeking a writ commanding the Clerk of this Court to vacate the judgment entered on February 22, 2000

(Continued on following page)

That certificate was issued the same day (Doc. 169); and, on March 2, 2009, the Court of Appeals (Doc. 170) remanded the case in full to this Court.

Accordingly, on March 4, 2009, (Doc. 171) this Court granted the Petitioner's motion to set aside the earlier judgment, and further granted the Petitioner leave to file an amendment to his petition, if he wished to do so, by adding the described alternative prayer for relief.

Rather than submitting an amendment to the petition as allowed, the Petitioner elected to file – without additional leave to do so – a complete revision of the original pleading (Doc. 180) stating enlarged prayers for relief, one of which was the alternative prayer permitted by the order of March 4, 2009 (Doc. 171).[2] The United States moved to strike

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in *United States* v. *Weiss*, Case No. 6: 98-CR-99 PCF-KRS (Doc. 1372), and to reenter a judgment in identical form in every respect except that any reference to Count Ninety Three of the Indictment, and any reference to or accumulation of any criminal sanction related to Count Ninety Three, shall be omitted. If such an amended petition is filed, the Court will then issue an order to show cause [why that relief should not be summarily granted] but otherwise denying the petition." (Doc. 168, page 26).

[2] Attached to the Amended Petition were 96 separately tabbed documentary exhibits most of which were, and are, already of record as a part of Doc. 135. Nevertheless, it appears that all of the documents attached to the Amended Petition are self authenticating and, in the interest of completeness of the record, shall be exempted from the order of June 10, 2009 (Doc. 184) striking the Amended Petition itself.

the Amended Petition and, by order entered June 10, 2009, (Doc. 184) the Court granted the motion and struck the Amended Petition in its entirety except for the alternative prayer for relief allowed by the order of March 4, 2009. Additionally, in keeping with the Memorandum Opinion of December 15, 2008 (Doc. 168), the order of June 10 directed the parties to show cause why a writ of habeas corpus should not issue granting the alternative prayer for relief but otherwise denying the petition. Both parties have now responded to the order to show cause.

The United States urges the Court to proceed in the manner stated in the Memorandum Opinion. The Petitioner opposes that result on several grounds.

First, the Petitioner contends that there is an unresolved issue of fact, namely, whether Austria relied upon assurances that the Petitioner would be granted a resentencing in the criminal case as to *all* counts of conviction followed by a plenary appeal.[3] However, as discussed in the Memorandum Opinion (Doc. 168 at pages 11-13), the June 6, 2008 formal diplomatic response of the Austrian Federal Ministry for European and Foreign Affairs supplies a clear response: "It is up to the American side to make sure that the imposed sentence will be newly assessed by

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[3] To remove any doubt about the Court's findings, the Memorandum Opinion of December 15, 2008 (Doc. 168) is adopted and confirmed as the Court's findings of fact and conclusions of law.

means of an American judicial decision *in order to correspond to the partial rejection (i.e. concerning Count Ninety Three) of the extradition.*" (Emphasis supplied.) And, with regard to a plenary appeal, it is the intention of the Court through reentry of the judgment to revive the Petitioner's right of appeal in compliance with the rule of specialty subject, of course, to the determination of the Court of Appeals concerning the effect, if any, of its own prior orders relating to the Petitioner's appeal in the criminal case. In that respect the Petitioner argues that the law of the Circuit appears to be that the dismissal of an appeal under the fugitive disentitlement doctrine is *res judicata* and any claims that could have been raised in the dismissed appeal are procedurally barred from being raised in any future appeal or collateral attack.[4] However, the authorities cited in support of that proposition did not involve enforcement of treaty obligations or the rule of specialty and are clearly distinguishable on that basis.

The Petitioner also repeats his argument that the Court has no jurisdiction to vacate and then reenter judgment in this §2241 proceeding, but if that is so, the argument would seem to be suicidal. The Court has already determined that outright release is an

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[4] The Petitioner makes this argument in apparent conflict with his own interest presumably because of his overriding position that the Court has no authority or jurisdiction in this proceeding under 28 USC §2241 except to order his immediate release.

excessive and unauthorized remedy,[5] and if a lesser alternative is unavailable, the inexorable result would be dismissal.

Finally, the Petitioner urges two other points worthy of comment. One is that the device of reentering a judgment cleansed of Count Ninety Three is "not so simple" (Doc. 188, page 5, n. 3) because the vacation of Count Ninety Three "will also require the removal of any enhancement based on that count (obstruction of justice)." Id. This assertion overlooks the fact that Judge Fawsett imposed the maximum statutory sentence applicable to each count of conviction so that elimination of any Sentencing Guidelines enhancement is utterly inconsequential; the sentence(s) as to all counts other than Count Ninety Three would remain the same.

The second point urged by the Petitioner is that any judgment to be reentered in the criminal case as a consequence of this proceeding should be stayed pending the appeal in this case so that simultaneous appeals can be avoided, especially because the appeal in the criminal case may become moot if the Petitioner prevails on his appeal in this proceeding. The point has some force but is best left to the Court of Appeals itself.

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[5] See Memorandum Opinion (Doc. 168, pages 20-23).

CONCLUSION

The Court will proceed with the disposition described in the Memorandum Opinion of December 15, 2008 (Doc. 168).

1. All unresolved motions, if any, are Denied as moot.

2. The petition for a writ of habeas corpus under 28 USC §2241, as amended, is hereby GRANTED and the Writ is hereby Issued to the extent provided by paragraph 3 below, but in all other respects the petition is DENIED. The Clerk is Directed to enter final judgment in this cause to that effect.

3. The Clerk is further directed to file a copy of this Order in the criminal case – *United States* v. *Weiss*, Case No. 6:98-CR-99 PCF-KRS (Orlando Division).

4. The judgment entered on February 22, 2000, in *United States* v. *Weiss,* Case No. 6:98-CR-99-PCF-KRS (Orlando Division) is hereby VACATED and the Clerk is Directed to forthwith reenter in that case a judgment in a form identical in every respect to the vacated judgment except that any reference to Count Ninety Three of the Indictment, and any reference to or accumulation of any criminal sanction related to Count Ninety Three, shall be omitted. Specifically, referring to the vacated judgment, the last two lines on page 1, relating to Count 93, should be deleted from the amended, reentered judgment. On page 2, the signature line should be completed by adding the

following endorsement: "This amended and reentered judgment is made pursuant to the Order of the Court entered on July 16, 2009, as Doc. No. 189 in *Weiss* v. *Yates*, Case No. 5:02-cv-204-Oc-10GRJ Vacating and directing reentry of the original judgment entered by the Hon. Patricia C. Fawsett on February 22, 2000 as Doc. No. 1372 in this action." On page 3, the aggregate term of imprisonment should be restated as "Eight Hundred Thirty Five Years" rather than "Eight Hundred Forty Five Years," and the reference to "and 93" should be deleted. On pages 5 and 12, the Total Assessment should be restated as $4000.00 rather than $4050.00. On page 7, the Imprisonment Range should be shown as 360 months to life imprisonment. On page 8, the phrase "and Count 93 of the Indictment charging you with Obstruction of Justice in violation of Title 18, United States Code, Section 1503" should be deleted. On page 9, in keeping with Judge Fawsett's handwritten notations, the phrase "or as noted by the Court in the presentence report" should be added after the word "addendum;" the Total Offense Level should be changed from 43 to 42; and the range of imprisonment should changed to "360 months to life." On page 10, the reference to "and 93" should be deleted. On pages 10 through 13 of the vacated judgment, the amended reentered judgment should reflect each and all of the handwritten additions or modifications made by Judge Fawsett. No changes are necessary or appropriate with respect to the term or the conditions of Supervised Release, the amount of the fine or the amount of the order of

restitution because Count 93 had (and has) no impact on those elements of the sentence and judgment.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 16th day of July, 2009.

/s/ W. Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record
Maurya McSheehy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHOLAM WEISS,

Petitioner,

-vs-

Case No.
5:02-cv-204-Oc-10GRJ

STAN YATES, WARDEN
FCC COLEMAN,

Respondent. /

MEMORANDUM OPINION

This proceeding was commenced under 28 U.S.C. § 2241 by a convicted federal inmate (Weiss) seeking a writ of habeas corpus commanding that he be released from custody.[1]

The basis of the claim is an alleged treaty violation by the United States of its extradition Treaty with the Republic of Austria.[2] The petition alleges as its major premise that during extradition proceedings in Austria resulting in Weiss' return to this country,

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[1] Weiss was indicted and tried in the Orlando Division. He fled while the jury was deliberating, and was then convicted and sentenced *in absentia*. He was later extradited from Austria and remains in custody serving his sentence.

[2] Extradition Treaty Between the Government of the Republic of Austria and the Government of the United States of America, Jan. 8, 1998, T.I.A.S. 12916 (ratified by Congress and entered into force Jan. 1, 2000) (hereafter the Treaty.)

the United States deliberately misled Austrian authorities about certain principles of American law that would apply to Weiss' case should he be extradited. From that premise it is argued that such deceptions breached the United States' obligation of good faith under the Treaty so that the resulting extradition was and is invalid; and, because the extradition was and is invalid, Weiss concludes that the United States presently has no jurisdiction over his person. The requested relief is a writ commanding not merely that Weiss be released, but that he be returned to Austria and released there.[3]

Notably, the petition does not allege any direct violation of the "rule of specialty," but argues that "this situation is analogous" to such a case. (Doc. 1, page 19.)[4] And this is odd in the extreme because the United States has conceded throughout this proceeding that another aspect of the case does violate the rule of specialty and should be corrected. Specifically, in accord with applicable provisions of the Treaty, Austria withheld extradition as to Count Ninety Three of the indictment (alleging an obstruction of

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[3] The Petition is less than precise in describing the relief requested. In argument, however, counsel for Weiss has specified that release in Austria is the remedy being sought.

[4] The "rule of specialty" prohibits a requesting state from prosecuting or punishing an extradited person for any offense as to which extradition is withheld by the requested state. *United States v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234 (1886); *United States v. Puentes,* 50 F.3d 1567 (11th Cir. 1995); *Gallo-Chamorro v. United States,* 233 F.3d 1298 (11th Cir. 2000).

justice offense) because there is no corresponding crime – no "dual criminality" – under Austrian law. Any punishment of Weiss based upon his conviction of the offense charged in Count Ninety Three would therefore violate the rule of specialty and, as stated, the United States has consistently conceded this point.

The dispute thus presents novel and difficult issues of law, especially with regard to remedy, and it has already been pending far too long. However, a recent development now facilitates a summary disposition, and the Court intends to take advantage of that opportunity.

A. Present Status and Disposition

The case is pending on remand from the Court of Appeals (See Docs. 60 and 104) to consider Weiss' Federal Rule of Civil Procedure 60(b) motion (Doc. 57) to alter or amend a judgment previously entered (Doc. 52) denying the petition with prejudice.

The Court has decided that a certificate will now be issued to the Court of Appeals suggesting a further remand to permit this Court to grant the Rule 60(b) motion (Doc. 57) and vacate the previous order and judgment (Docs. 51 and 52). The certificate will further inform the Court of Appeals, by reference to the reasons stated in this opinion, that upon vacation of that judgment it is the intention of the Court to afford to Weiss a limited opportunity to amend his petition under § 2241 by adding an alternative prayer

for relief.[5] If the petition is so amended, it would then be the intention of the Court to enter an order to show cause directing the parties to respond and demonstrate why any further evidentiary proceedings are required, that is to say, why the petition should not be summarily granted on the existing record and a writ of habeas corpus issued to effect such alternative relief.[6] If Weiss elects not to amend his petition, it

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[5] The alternative prayer for relief, if asserted, may seek the issuance of a writ commanding the Clerk of the Court to vacate the judgment entered February 22, 2000, in *United States v. Weiss*, Case No. 6:98-cr-99-PCF-KRS and to then reenter the judgment in identical form in every respect except that any reference to Count Ninety Three of the Indictment, and any reference to or accumulation of any criminal sanction relating to Count Ninety Three should be omitted. For the reasons explained later in this opinion, such a result would comply with the rule of specialty created by Austria's refusal to extradite Weiss as to Count Ninety Three, and it would arguably afford Weiss his former right of appeal from the conviction and sentence as a whole thereby rectifying the breach of the Treaty alleged in the petition (a breach that is now asserted by Austria itself in an anticipatory manner if relief is not granted in this proceeding. See discussion, *infra.*) Whether reentry of the judgment would in fact create a new right of appeal in the criminal case, given the Court of Appeals' previous refusal to reinstate Weiss' appeal in facilitation of the extradition (see discussion, *infra.*) is, of course, for the Court of Appeals to determine.

[6] The United States appears to be satisfied with the completeness of the record, having moved (Doc. 137) to terminate discovery (which will be granted by separate order); and, presumably, though disappointed that discovery has ended, Weiss may be equally content with the existing record given the Court's decision that it already justifies all of the relief to which he is entitled. Besides, the statute expressly contemplates that

(Continued on following page)

would be the intention of the Court to reenter the judgment of dismissal with prejudice on the basis that the relief requested in the existing petition under § 2241 is excessive and inappropriate as a matter of law.

B. Background

Weiss and others were indicted in the Orlando Division of this Court in 1998. (Case No. 6:98-cr-99-PCF-KRS).[7] He was charged with a spate of RICO, money laundering and other offenses arising out of the failure of National Heritage Life Insurance Co. One of the charges – Count Ninety Three – alleged an obstruction of justice offense in violation of 18 U.S.C. § 1503 by presenting false documents and giving false testimony before a grand jury. Trial began before Judge Fawsett in Orlando on February 1, 1999, and

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habeas corpus proceedings under § 2241 may be conducted in a proper case outside the bounds of the Federal Rules of Civil Procedure. Title 28 U.S.C. § 2243 states: "The court shall summarily hear and determine the facts and dispose of the matter as law and justice require." *See also Harris v. Nelson,* 394 U.S. 286, 89 S.Ct. 1082 (1968); *Walker v. Johnston,* 312 U.S. 275, 61 S.Ct. 574 (1941), and Federal Rule of Civil Procedure 81(a)(4).

[7] It is entirely coincidental that the present petition under 28 U.S.C. § 2241 was filed in the same district in which the underlying criminal prosecution was brought. Venue in this proceeding under § 2241 lies in this Court, not because Weiss was prosecuted and convicted here, but because he happened to be confined in the Coleman Federal Correctional Complex located within this district, Ocala Division, at the time the petition was filed.

continued for eight months. Weiss was at liberty on bail. He attended the trial until the case was submitted to the jury. Weiss then absconded and failed to appear.[8] The jury proceeded with its deliberations and returned its verdict on November 1, 1999. The absent Weiss was found guilty of multiple offenses as charged in seventy eight counts of the indictment including Count Ninety Three. The Court adjudicated Weiss to be guilty in accordance with the verdict and scheduled a sentencing hearing.

At the sentencing held on February 15, 2000, conducted *in absentia* with regard to the fugitive Weiss, Judge Fawsett imposed a term of commitment consisting of both concurrent and consecutive components, count by count, aggregating 845 years.[9] As to Count Ninety Three, the Court imposed a statutory maximum term of ten years imprisonment consecutive to all other counts.

Judgment was entered on February 22, 2000. Weiss' counsel filed a notice of appeal the following day. The Government promptly moved to dismiss the appeal on the basis of the "fugitive disentitlement" doctrine,[10] and the Court of Appeals granted the

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[8] A warrant for his arrest was issued in December, 1999.

[9] The Court also levied a fine, ordered a forfeiture and restitution, imposed the mandatory special assessments, and provided for a period of supervised release.

[10] *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498 (1970) (fugitive status "disentitles the defendant to call upon the resources of the court for determination of his claims."). *See also,*

(Continued on following page)

motion. Weiss' appeal was dismissed on April 12, 2000.

Six months later, in October, 2000 – almost a year after his elopement at the end of trial –Weiss, a citizen of the United States, was found in Austria. He was provisionally arrested by Austrian authorities at the request of the American Embassy acting on behalf of the Department of Justice. Afterward, on December 18, 2000, the United States formally requested extradition under the Treaty.

Over the next eighteen months, from mid December, 2000, until June, 2002, ongoing Austrian judicial proceedings were accompanied by numerous negotiations and exchanges of information between responsible American and Austrian officials. In the midst of that period, and in an obvious effort to meet the concerns being expressed by Austria about the availability of appellate review of Weiss' conviction and sentence, the United States filed in the Eleventh Circuit Court of Appeals on June 22, 2001, a motion seeking reinstatement of Weiss' appeal effective upon his extradition. The Court of Appeals summarily denied the motion without explanation on June 29, 2001.

Weiss was ultimately extradited and returned to this country in early June, 2002, although judicial

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Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S.Ct. 1199 (1993); *Lynn v. United States*, 365 F.3d 1225 (11th Cir. 2004).

proceedings continued in Europe well into 2003.[11] Immediately following his arrival in this country, the United States filed in the criminal case in this Court (on June 21, 2002, Orlando Division) a motion for resentencing of Weiss as to Count Ninety Three of the indictment. The motion was denied by Judge Fawsett on June 25, 2002. The Government then filed a renewed motion on July 12, 2002, seeking the same relief. That motion was also denied. The Government appealed, but later sought a voluntary dismissal which was granted by the Court of Appeals on January 8, 2003.

In the meantime, on July 17, 2002, as an inmate at the Coleman Federal Correctional Complex within this district, Weiss filed this proceeding in the Ocala Division of the Court under 28 U.S.C. § 2241.

The petition alleges that the United States deliberately misrepresented American law to the Austrian authorities in derogation of its obligations under the Treaty; that the resulting extradition of Weiss, therefore, was a violation of the Treaty which now deprives the courts of the United States of jurisdiction of his person to enforce his sentence; that he has standing to enforce the Treaty; and that, as a remedy, the writ should issue commanding his release from custody.

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[11] Neither party is presently suggesting that the results of any of those proceedings has any binding or controlling effect in this action.

C. History of This Proceeding

Now six years old – presenting issues of fact and law that are both novel and complex – the case has obviously had a protracted and somewhat convoluted history.[12]

The United States initially responded to the petition by filing a motion to dismiss for failure to state a claim upon which relief might be granted, arguing that Weiss lacked standing to assert any violation of the Treaty. The motion also sought summary denial of the petition on the ground that Weiss, as a matter of law, would not be entitled to the relief being sought, namely, his outright release.

On January 10, 2005, after thorough briefing, the Court entered an order denying the United States motion to dismiss based upon lack of standing, but granted a summary denial of the petition on the merits finding that Weiss would not be entitled to the relief being sought. Judgment was entered the following day.

Weiss filed a notice of appeal (Doc. 53) (assigned Case No. 05-11470-GG in the Court of Appeals.). While the appeal was pending, however, Weiss also filed in this Court a Federal Rule of Civil Procedure

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[12] Among other things, there have been several substitutions of counsel and extensive motion practice accompanied by numerous briefs. Over the course of the litigation the parties have sought – and the Court has granted – no less than twenty extensions of time for the filing of these papers.

60(b) motion for relief from judgment (Doc. 57), and the Court of Appeals on August 2, 2005, entered an order staying the appeal (Doc. 60) pending resolution of the Rule 60(b) motion here. Following numerous extensions of time for the filing of briefs, this Court entered an order on June 20, 2007 (Doc.92) denying the Rule 60(b) motion. Weiss responded by filing a motion for reconsideration (Doc. 93) and, subsequently, a notice of appeal (Doc.96) (assigned Case No. 07-13921-JJ in the Court of Appeals.).

On September 24, 2007, after hearing argument, this Court entered a Certificate to the Court of Appeals (Doc. 100) representing that, if the case was remanded, this Court would grant the pending motion for reconsideration (Doc.93) and conduct further proceedings on Weiss' Rule 60(b) motion seeking relief from the earlier judgment denying the petition. The Court of Appeals promptly reacted to that Certificate by remanding the case and terminating the appeal designated as Case No. 07-13921-JJ. (Doc.104). The Court left in place, however, its earlier stay order of August 2, 2005, in appeal No. 05-11470-GG such that, in the event this Court makes a further certificate that it will grant the Rule 60(b) motion, an additional remand will be required for that purpose. (See Doc. 104).

After the Court of Appeals issued its remand, this Court entered an Order (Doc. 106) granting Weiss' motion for reconsideration, vacating the order denying his Rule 60(b) motion, and reviving that motion

for further litigation including the allowance of discovery proceedings.

In its Certificate to the Court of Appeals (Doc. 100), this Court enumerated the issues of fact and law to be resolved before a ruling can be made on the Rule 60(b) motion – in effect, before a dispositive ruling can be made on the merits of the case. The Court observed that the dispute between the parties had narrowed to:

> (1) the question of what assurances were made to the Austrian authorities concerning Petitioner's right to appellate review of his conviction and sentence;
>
> (2) whether, assuming the Austrians were assured that appellate review would be available, the Austrian authorities then relied upon the positive assurances given by the United States;
>
> (3) whether the nonfulfillment of those assurances violates the Treaty so as to render the extradition invalid; and
>
> (4) if so, what is the appropriate remedy under § 2241?

Since the entry of that Certificate and the allowance of discovery[13] the Parties have filed (together

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[13] By order entered April 30, 2008 (Doc. 131) the Respondent was directed to produce, in effect, every non privileged document, note, memorandum, calendar, log, writing or electronic record of any kind in its possession that relates in any way to

(Continued on following page)

with earlier filings and appendices) a substantial volume of documents. At present, the matters before the Court – in addition to the Rule 60(b) motion – consist of a motion by Weiss to compel additional production (Doc. 135), and a motion by the United States to terminate discovery (Doc 137).

A hearing was conducted on those motions on August 27, 2008, and a separate Order deciding them has been entered today denying Weiss' motion to compel additional production, and granting the motion of the United States to terminate discovery. (Doc. 167). Since the August hearing Weiss has also filed a Motion to Strike and for other relief (Doc. 159), and two additional pleadings entitled Notice of Filing Correspondence (Docs. 160 and 163) in which specified relief is sought. Those motions have also been denied in the order entered today (Doc. 167). Given those rulings, the Court deems further hearings or argument with respect to the issues decided in this Memorandum Opinion to be unnecessary. Under the process contemplated by the Court, the Parties will have a future opportunity to be heard before judgment is entered.

D. Recent Development

During the course of the litigation, the United States (the Department of Justice) has suggested to

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the Weiss extradition, and to prepare and file a privilege log with respect to any such item not produced.

the Court that it was in the process of attempting to have transmitted to Austria (by the Department of State) a formal diplomatic message inquiring as to Austria's understandings and intentions relating to the Weiss extradition. The Court encouraged such efforts but declined to abate the litigation in the meantime. (*See* Doc. 131, Order entered April 3, 2008).

The record now reveals that on March 8, 2008, the Department of State, through the United States Embassy in Vienna, conveyed a formal diplomatic inquiry to the Ministry of Foreign Affairs of the Republic of Austria " . . . regarding the extradition of U.S. national Shalom Weiss, who was extradited from Austria to the United States in 2002." (Doc. 135, Tab 104). The body of the communication then stated:

> ". . . Mr. Weiss contends that two letters, dated February 8, 2002, and May 14, 2002 [Doc. 135, Tabs 45 and 59] from the U.S. Department of Justice to the Austrian Ministry of Justice, expressing the opinion that Mr. Weiss would be permitted an appeal, constituted an assurance that the Government of Austria relied upon as binding on the United States.
>
> * * *
>
> In an effort to resolve this issue, we ask the Government of Austria to respond to the following questions: (1) Whether your Government believes that the United States provided an assurance that Mr. Weiss would

> be entitled to appeal his entire sentence if he were extradited; (2) If so, whether your government viewed any such assurance as binding; (3) If so, what constitutes such an assurance of an appeal; and (4) If the Government of Austria believes that the United States is in violation of an obligation concerning this assurance, what action by way of remedy is expected of the United States."[14]

On June 6, 2008, the Austrian Federal Ministry for European and Foreign Affairs, utilizing a letter from the Austrian Minister of Justice, replied to the American questions (Doc. 135, Tabs 105 and 106). The translations of the originals from German to English differ slightly, but the primary communication from the Minister of Justice states:

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[14] In the first part of this quoted communication, the characterization of the letters by the United States as "expressing the opinion" is self serving if not disingenuous. The letter of February 8, 2002 recites that the purpose of the communication is to provide "the following information" – not "the following opinion" – and there is nothing in the remainder of the letter that qualifies the statements made as opinions rather than facts. The letter of May 14, 2002, discussed in more detail, *infra,* is mixed. It first makes the unqualified declaration that if Weiss should be extradited on condition that he not be punished for certain offenses, " . . . the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition." The next sentence then begins: "In our *opinion,* this would result in Weiss being permitted to file a full appeal on all issues . . . " (Emphasis supplied).

"With Regard to questions 1. through 3:

The Republic of Austria acted upon the assumption of the validity of the principle of specialty. In light of the notes of the U.S. Department of Justice delivered to the Federal Ministry of Justice concerning the American legal situation, it had been the understanding of the Republic of Austria that compliance with the principle of specialty would lead to a resentencing by an American judicial decision, and that the newly assessed sentence would be subject to a full appeal in accordance with the American legal system.

* * *

Regarding question 4.:

To begin with, Austria is not of the opinion that any assurances have thus far been disregarded by the American side, because the present Habeas-Corpus proceedings in the United States intending the adaption of the sentence to comply with the principle of specialty are still pending.

However, Austria continues to hold the view that the United States has thus far not fulfilled its obligation to comply with the principle of specialty. It is up to the American side to make sure that the imposed sentence will be newly assessed by means of an American judicial decision in order to correspond to the partial rejection (*i.e.* concerning Count Ninety Three) of the extradition. Compliance with the principle of specialty is independent

of the will of the concerned person, and would be binding even if the concerned person would declare itself against a reassessment of the sentence."

E. Discussion

(1) Weiss' standing to seek relief

This Court held in denying the Government's motion to dismiss that Weiss has standing to derivatively assert and enforce the rights of Austria under the Treaty, and to seek relief from any violation of the rule of specialty, subject to the paramount right of the requested nation, Austria, to waive the violation if it chooses to do so. That is the clearly established law of the Circuit as decided in *United States v. Puentes,* 50 F.3d 1567 (11th Cir.), *cert. denied,* 516 U.S. 933, 116 S.Ct. 341 (1995), (citing *United States v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234 (1886)). *See also, Gallo-Chamorro v. United States,* 233 F.3d 1298 (11th Cir 2000).

It should also be noted that 28 U.S.C. § 2241(c)(3) compels the same conclusion. The statute expressly extends the availability of the writ to prisoners who are " . . . in custody in violation of the Constitution or laws or treaties of the United States. . . ." (Emphasis supplied).

In this country, consistent with the Supremacy Clause of the Constitution, Article VI, Clause 2, a treaty is more than an international political compact between the United States and the executive

department of a sovereign state. Rather, treaties ratified by Congress – like the one here – have the status of positive domestic law on the same plane as the Constitution and statutes of the United States (*Rauscher, supra,* 119 U.S. at 418-419, 7 S.Ct. at 240-241); and, as a part of the domestic law of the United States, Article III, Section 2 of the Constitution expressly extends the enforcement of treaties to the judicial power of the Article III courts. The Constitution says, in clear and unmistakable terms:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority –"

Furthermore, any question that might be raised about Congressional implementation of Article III, Section 2 is answered completely by § 2241(c)(3) extending the writ to prisoners in custody in violation of "treaties of the United States." What possible meaning could the statute have – in what field of operation would it apply – other than to accomplish Congressional implementation of the judicial power and create standing by providing a procedural mechanism for a prisoner to seek vindication of his derivative rights under a treaty through a writ of habeas corpus issued by an Article III justice or judge? Any decisional authority not taking into account the pertinent provisions of the Constitution and the language of § 2241(c)(3), while stating the conclusion that individual prisoners lack standing in a § 2241

proceeding to assert derivative rights under a Congressionally ratified treaty, or that such a treaty is a political document beyond the purview of the courts, are wholly unpersuasive. *Puentes* got it right; besides which it is the law of the Circuit and binding on this Court in any event.

(2) Violations of the Treaty

(a) Count Ninety Three

Having decided, then, that Weiss has standing to assert a violation of the Treaty, coupled with the recent declaration by Austria that it continues to expect compliance, the case is all but over except to determine the form and scope of the remedy. This conclusion follows because the United States has never disputed that extradition was denied by Austria with respect to Count Ninety Three of the indictment, and the rule of specialty now forbids any punishment of Weiss for that offense.[15] Some remedy is required. Or is it? Weiss has never sought relief regarding that aspect of the case, and Austria has

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[15] *See* Doc. 6, page 16. Until the Austrian government declared in the recent diplomatic exchange its continuing expectation of compliance with the rule of specialty, the United States had defended against any relief being granted to Weiss on the basis that (in addition to his asserted lack of standing) Austria had manifested its intent to waive any breach of the Treaty because it had not complained. It is now clear that Austria has not intended to waive anything and still expects compliance with the rule of specialty.

now declared that it will not consider that the Treaty has been breached by the United States unless and until this very proceeding has concluded without corrective action being taken. This conundrum will remain to be resolved *infra*.

(b) The Lack of Appellate Review

Apart from the issues surrounding Count Ninety Three, there are also the questions stated earlier arising out of Weiss' claim (indeed, his only claim) that the United States breached the Treaty by misrepresenting the state of American law governing appellate review of his conviction and sentence. What assurances were made to the Austrian authorities about Weiss' appellate rights? Did the Austrian authorities rely upon any such assurances? Did nonfulfillment of those assurances violate the Treaty? If so, what is the remedy for that violation?

The Austrian response to the diplomatic inquiry does not completely resolve these issues. The response does make it clear, however, that the Austrian side did expect – and still does – that resentencing as to Count Ninety Three removing any criminal sanction for that offense would consequentially result in opening the judgment to a plenary appeal, and that Austria places "rule of specialty" significance on that result.

(I) Did the United States Misrepresent the Law?

Weiss has vigorously argued that the Department of Justice lawyers who represented the United States in its dealings with Austria during the extradition proceedings deliberately misdescribed the state of the law that would govern Weiss' rights of appeal from his conviction and sentence if he should be returned by way of extradition.[16]

Weiss points to several specific documents in support of this claim. In general terms, each of these documents attempts to persuade the Austrian officials that direct review on appeal is only one of several avenues of relief open to convicted offenders under United States law, and that such additional remedies

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[16] There was also a claim that the United States had misrepresented Weiss' eligibility for parole, and the Austrian documents *do* reflect a misconception about the availability of parole in Weiss' case. But there is no evidence in this record of a misrepresentation by United States officials concerning that subject, and the claim seems to have been abandoned in Weiss' more recent briefs and arguments. Of course, if there were any misrepresentations of any kind made by government lawyers either here or abroad, severe sanctions might be in order. In this instance, however, the Court will not concern itself with any such ancillary inquiries or proceedings because the Office of Professional Responsibility of the Department of Justice exists for just that purpose and is in a far better position than the Court to pursue any complaint that might be made about professional misconduct by DOJ personnel.

should suffice to satisfy the requirements of the Treaty despite the dismissal of Weiss' direct appeal.[17]

The first of the communications singled out by Weiss is an email from Ernestine Gilpin, Department of Justice, Office of International Affairs, to Dr. Stefan Benner, the Austrian Minister of Justice, dated March 23, 2001. (Doc. 135, Tab 21).[18] Ms. Gilpin first describes, accurately, the concept of the fugitive disentitlement doctrine and the dismissal of Weiss' appeal for that reason. She then made the statement that "[h]ad Weiss returned to the United States prior to entry of the order dismissing the appeal, the court probably would have denied the Government's motion [to dismiss.]" That is the only questionable comment in the communication, and the Court cannot say that it was wrong, let alone deliberately deceptive. First, the statement is qualified by use of the word "probably," thereby clearly conveying that the matter was conjectural. Second, given the existing decision in *Ortega-Rodriguez v. United States,* 507 U.S. 234, 113 S.Ct. 1199 (1993), closely on point in relation to the

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[17] Article 9 of the Treaty, pertaining to "Convictions in Absentia," provides that the requested state may insist on assurances that " . . . the person was afforded an adequate opportunity to present a defense or that there are adequate remedies or additional proceedings available to the person after surrender."

[18] Ms. Gilpin's email was in response to an earlier request from Dr. Benner for information as to whether Weiss " . . . had a right of appeal against the conviction . . . and sentence . . . that was not exercised by the defendant." (Doc. 135, Tab 20.)

hypothetical posited in Gilpin's email, there was clearly a jurisprudential basis for the conjecture at the time it was made. Further, as the Austrians themselves have now pointed out, there is still the possibility of an appeal in the criminal case as a result of this proceeding under § 2241. The Court concludes, therefore, that there was nothing in Gilpin's email of March 23, 2001, that was wrong or deceptive.[19]

More troublesome are letters dated February 8, and May 14, 2002 (Doc. 135, Tabs 45 and 59) from Gilpin to Benner saying essentially the same thing, namely:

> "If Weiss is extradited subject to the condition that he not be punished for offenses involving false statements to government officials or in judicial proceedings, the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition. In our opinion, this would result in Weiss being permitted to file a full

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[19] Weiss also points to a letter from Gilpin to Benner dated June 22, 2001 (Doc 135, Tab 28) transmitting a letter from an Assistant United States Attorney to Gilpin dated June 21, 2001 (Doc. 135, Tab 29) discussing, among other things, a defendant's post conviction remedies under 28 USC § 2255 and Federal Rule of Criminal Procedure 33 (motion for a new trial.) The Court does not discern any deception in these letters. There was no representation that any relief would necessarily be available pursuant to these remedies in Weiss' particular case; and, in fact, the letter from the Assistant United States Attorney concluded with an express disclaimer to that effect.

> appeal on all issues, including the guilty verdict. . . . and his sentence." (Letter of May 14, 2000.)

Obviously, the statement that the presiding judge would be required by the rule of specialty to resentence Weiss was wrong. Judge Fawsett had no jurisdiction to do so in the criminal prosecution, as she so held; the judgment of commitment had become final.[20] However, whether the statement was just wrong, or constituted a deliberate deception, is of no consequence to a decision on the merits of this dispute.[21] If there was a misrepresentation concerning the nature of the procedural device that would result in obedience to the rule of specialty, it simply does not matter, in so far as the Treaty obligations are concerned (as distinguished from possible disciplinary inquiries) as long as the rule of specialty is honored in the end. And that is precisely what the Austrian authorities have pointed out in their response to the diplomatic inquiry about their understanding and intention in the matter. Indeed, their response that

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[20] *See United States v. Bakhtiar,* 964 F. Supp. 112 (S.D.N.Y.1997) (reaching the same conclusion on similar facts). However, to the extent that Judge Stanton inferred, without discussion, that a writ under § 2241 would not be available to the petitioner in a multi-count case until he began service of the sentence in issue, that conclusion would directly conflict with Supreme Court precedent. *Peyton v. Rowe,* 391 U.S. 54, 88 S.Ct. 1549 (1968) (a habeas petitioner serving consecutive sentences is "in custody" within the meaning of § 2241 and has standing to seek the writ with regard to the consecutive sentence.)

[21] *But see* note 16, *supra.*

Austria does not consider the Treaty to have been violated at all up to this point demonstrates the present irrelevancy of Judge Fawsett's refusal to resentence and properly focuses attention on the rule of specialty; and the rule of specialty involves Count Ninety Three and the remedies that might be available in this proceeding: (1) elimination of any criminal sanction as to Count Ninety Three; and (2) a resulting plenary appeal from the judgment as a whole. The statements or assurances that were given concerning the procedures that would be followed in enforcing the rule have simply fallen by the wayside.

The Court concludes, therefore, that there was no substantial breach of the Treaty by virtue of the representations made to Austrian officials by representatives of the United States, and there is no lack of jurisdiction on the part of the United States, or this Court, to enforce the judgment except for Count Ninety Three if the rule of specialty is properly invoked concerning that issue.

(3) The Flaw in the Petition – Failure To Seek The Proper Remedy

The petition is flawed, nevertheless, because it does not seek an available remedy (short of outright release) that would fully recognize and enforce the rule of specialty – that is, a remedy that would eliminate the effect of Count Ninety Three from the judgment and afford Weiss his right of plenary appeal. Rather, Weiss has avoided pursuit of that relief for

the stated reason that the Court has no authority to grant any remedy but release. (A cynic might question whether the lesser remedy has been shunned only because it doesn't restore his immediate freedom). In any event, Weiss wants to be returned to Austria and released there.[22]

Weiss makes a three pronged argument that the Court has no authority to do anything but order his release. First, he points to the provision in the Sentencing Reform Act, 18 U.S.C. § 3582(c), that the Court "may not modify a term of imprisonment once it has been imposed" except under circumstances not applicable here. But that constraint is clearly aimed at, and limited to, the sentencing court in the administration of the criminal prosecution; it has nothing to do with the remedies that might be available in a collateral habeas proceeding under 28 U.S.C. § 2241, and Weiss cites no authority to the contrary.

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[22] The refinement of being returned to Austria before being released was developed at the hearing conducted on August 27, 2008, after the Court inquired whether, if Weiss should be granted the writ and released so that this proceeding closes in his favor, could he then be subject to immediate arrest with impunity pursuant to the still unsatisfied judgment of commitment? Weiss responded, through counsel, that he was entitled to be returned to Austria. But what authority does the Court have to order his return to Austria in the absence of a visa or other suitable document issued by the Austrian government demonstrating its willingness to receive him? None of the growing volume of papers from Austrian officials contain any request – or grant any permission – for Weiss to be returned to that country.

The second prong of Weiss' argument is singularly predicated upon the general dictum in *Fay v. Noia*, 372 U.S. 391, 402, 83 S.Ct. 822, 829 (1963), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991) that where the imprisonment of a petitioner "cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." In fact, however, the holding in the case did not result in the petitioner's "immediate release." The judgment consisted of a conditional writ directing that the petitioner be granted a new trial, failing which he would then be entitled to his release. Besides, the developed jurisprudence of the Supreme Court since *Fay v. Noia* culminating in the recent decision in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), makes it abundantly clear that a habeas court has a full arsenal of remedies to correct unlawful detentions short of ordering outright release where a lesser directive will suffice to right the wrong.[23] Indeed, any relief going beyond what is necessary to

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[23] In *Boumediene* the Court said (128 S.Ct. at 2271):

> "We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, *if necessary*, an order directing the prisoner's release." (Emphasis supplied).

See also, Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549 (1968), and *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373 (1963).

remediate the violation is unavailable as a matter of law and would constitute error if awarded. *See United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 668 (1981) ("remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.")

Ironically, Weiss' third and final argument that the only available remedy is to release him, is predicated upon the Eleventh Circuit's decision in *Wofford v. Scott,* 177 F.3d 1236 (1999), a seminal opinion normally relied upon by custodians in § 2241 proceedings to defeat the petitioner's application for the writ. *Wofford* held that the so called "savings clauses" in 28 U.S.C. § 2255 do not authorize the use of § 2241 as a means of circumventing the restrictions on successive habeas petitions unless the petitioner demonstrates reliance upon a retroactive Supreme Court decision establishing that the petitioner was convicted of a nonexistent offense, and Circuit law foreclosed assertion of the claim at the time his motion under § 2255 was filed, or should have been filed. Though not entirely clear, Weiss seems to argue by implication that his present claims could or should have been made under § 2255; that he cannot demonstrate that he meets the requirements of *Wofford*; and that, as a consequence, there is no available habeas remedy. Thus, he seemingly concludes, the only way to enforce the rule of specialty is to just release him. There are at least three fatal imperfections in this excessively strained contention. First, it was the Petitioner, Weiss, who invoked the Court's jurisdiction under

§ 2241, and if he has no available remedy under the statute then he has no remedy and the action must simply be dismissed. It certainly does not follow that he is entitled to be released if the Court lacks jurisdiction to do anything under § 2241. Secondly, the implicit argument that his present claims could and should have been made under § 2255 is self defeating. If that is so, and he cannot make the requisite showing under *Wofford*, then his claims are procedurally barred and that's the end of his case. And third, if the Austrians are correct that there will be no violation of the rule of specialty unless and until this proceeding itself is terminated without granting relief that enforces its view of the matter, then any claim under § 2255 is not yet ripe or mature and *Wofford* has no application.

The Court concludes that a writ commanding Weiss' immediate release would go well beyond the remedial action necessary to correct the wrong – the violation of the Treaty – and it is unavailable as a matter of law. *See United States v. Morrison, supra.*

(4) The Proper Course of Action

(a) The procedural posture of the case

Although the petition cannot be granted in its present iteration, the evidence generated through the discovery process since the earlier entry of the judgment – and especially the recent response of the Austrian government to the diplomatic inquiry – demands that Weiss be given an opportunity to

amend his petition if he chooses to do so.[24] The case is presently before the Court on limited remand from the Court of Appeals to decide Weiss' motion for relief under Federal Rule of Civil Procedure 60(b) from the earlier judgment of dismissal. For the reasons already stated in this opinion, and those that follow, the Court is prepared to grant that motion under Rule 60(b)(2) and (6) on the basis of the newly discovered evidence of the representations made to Austria relative to the development and imposition of the rule of specialty concerning Count Ninety Three, and especially the response of the Austrian government announcing that government's expectations concerning the rule of specialty.

A certificate will issue from this Court to the Court of Appeals suggesting an additional order of remand to permit this Court to grant the Rule 60(b) motion.

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[24] *See* Fed. R. Civ. P. 15(a) (providing that "leave [to amend] shall be freely given when justice so requires"); *Mayle v. Felix*, 545 U.S. 644, 665-66, 125 S.Ct. 2562, 2575-76 (2005) (recognizing that habeas petitioners may be granted leave to amend their petitions "when justice so requires."); *Gillette v. Tansy*, 17 F.3d 308, 312 (10th Cir. 1994) (same). *See also In re Hill*, 113 F.3d 181, 184 (11th Cir. 1997) (noting that a habeas petitioner could have moved to amend his petition pursuant to Fed. R. Civ. P. 15 at any time prior to the denial of the petition).

(b) Future proceedings upon remand

For the benefit of the Court of Appeals and the Parties, given the unique nature of this case both procedurally and substantively, in the event that the Court of Appeals issues an additional order of remand, it is the intention of the Court to grant the Rule 60(b) motion, to vacate the judgment, and to extend leave of court to Weiss to amend his petition by adding an alternative prayer for relief seeking a writ commanding the Clerk of this Court to vacate the judgment entered on February 22, 2000 in *United States v. Weiss,* Case No. 6:98-cr-99-PCF-KRS (Doc. 1372), and to then reenter a judgment in identical form in every respect except that any reference to Count Ninety Three of the Indictment, and any reference to or accumulation of any criminal sanction related to Count Ninety Three, shall be omitted. If such an amended petition is filed, the Court will then issue an order to show cause directing the Parties to demonstrate why the case should not be disposed of on the existing record by summarily granting that alternative relief but otherwise denying the petition. If such an amendment is not timely filed, the Court will then instruct the Clerk to enter a fresh judgment in this action denying the petition with prejudice.

The manner in which the Court intends to proceed – reentry of the judgment – will fully enforce the rule of specialty with regard to Count Ninety Three and, hopefully, will also cure any violation of the Treaty or the terms of the extradition with respect to Weiss' ability to appeal his conviction and sentence.

This technique has been used before, and has been expressly approved by the Eleventh Circuit in analogous cases to preserve a right of appeal that was unlawfully deprived. *See United States v. Phillips,* 225 F.3d 1198 (11th Cir. 2000) (establishing procedure for vacating judgment and reimposing sentence in a 28 U.S.C. § 2255 proceeding to provide defendant with right to an out-of-time appeal). *See also McIver v. United States,* 307 F.3d 1327, 1332 (11th Cir. 2002) (applying the same procedure in § 2255 proceedings and holding that "an order granting a § 2255 petition, and reimposing sentence, resets to zero the counter of collateral attacks pursued.") (internal citation omitted). Given the procedural and substantive posture of this case, it seems most appropriate to utilize this technique here as well.

CONCLUSION

By separate order the Court will certify to the Court of Appeals that if an additional remand of this case is made, this Court will Grant the pending motion (Doc. 57) to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2) and (6), and thereafter proceed in accordance with this Memorandum Opinion. The certificate will also contain a suggestion that such remand would be appropriate upon timely application by the parties.

The Clerk is directed to remove this case from the trial calendar set for March 2, 2009, and to cancel

the pretrial conference scheduled for February 18, 2009.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 15th day of December, 2008.

/s/ W. Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES

Plaintiffs,

v. CASE NO. 6:~~9998~~-CR-~~9899~~-ORL-19A

SHOLAM WEISS, et al.,

Defendants. /

ORDER

This case is before the Court on the United States' Renewed Motion for Re-Sentencing (Doc. No. 1928).

The United States moves the Court to re-sentence Defendant Sholam Weiss in accordance with the order under which Defendant was extradited from Austria. Specifically, the United States requests that the Court re-sentence Defendant on all counts of conviction except Count 93, as the Austrian extradition order authorized the Defendant's extradition on all counts except Count 93.

During his trial in 1999, Defendant Sholam Weiss failed to appear in Court in accordance with this Court's order. He became a fugitive and in his absence was convicted of multiple counts of Racketeering, Racketeering Conspiracy, Money Laundering, Interstate Transport of Stolen Property, False Statements and Obstruction of Justice. On February 15,

2000, the Court sentenced Defendant in absentia and imposed punishment for all counts of conviction, including Count 93 which alleged obstruction of justice.

Defendant remained a fugitive until his capture and arrest in Vienna, Republic of Austria, in October of 2000. On May 8, 2002, the Higher Regional Court in Vienna, Republic of Austria, authorized the Defendant's extradition to the United States on all counts for which he had been convicted, except Count 93. *See* (Doc. No. 1928, Exh. A-1). On May 10, 2002, the Austrian Federal Ministry of Justice informed the United States Department of Justice that Defendant's extradition was permissible except for Count 93. *See* (Doc. No. 1928, Exh. B-1). Finally, on June 9, 2002, the Austrian authorities surrendered custody of Defendant to United States officials in accordance with the extradition order. *See* (Doc. No. 1928, Exh. C-1).

The United States filed an original motion for re-sentencing which the Court denied without prejudice. *See* (Doc. Nos. 1925 & 1926). In its original motion, the United States failed to cite any authority or provide a copy of the United States/Austria Extradition Treaty. The United States has now filed a Renewed Motion for Re-sentencing and has cited authority and included a copy of the Extradition Treaty. The Defendant has not filed a response to the United States' Renewed Motion.

ANALYSIS:

The United States requests that the Court re-sentence Defendant eliminating any punishment for Count 93 because of the rule of specialty. Article 19 of the United States/Austria Treaty incorporates the rule of specialty and provides that:

> A person extradited under this treaty may not be detained, tried, punished, or subjected to any other restrictions of his personal liberty in the Requesting State in relation to an offense, except for: (A) an offense for which extradition has been granted.

(Doc. No. 1928, Exh D). "The 'principle of specialty,' long recognized in international law, provides that 'the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited.'" *U.S. v. Alvarez-Moreno,* 874 F.2d 1402, 1414 n.10 (11th Cir. 1989) (quoting *Shapiro v. Ferrandina,* 478 F.2d 894 (2d Cir. 1973)). The rule is designed to "preserve international relationships and protect the institution of extradition." *United States v. Diwan,* 864 F.2d 715, 720 (11th Cir. 1989).

Accordingly, the United States contends that the rule of specialty requires the Court to re-sentence the Defendant as he was not extradited on Count 93 and therefore cannot be sentenced for that Count. However, this case is different from the vast majority of cases applying the rule of specialty to an extradition.

In all but rare cases extradition occurs before trial, and the rule of specialty controls the charges for which the requesting state may prosecute a defendant. All the cases cited by the United States involve situations where a defendant was extradited to the United States to face trial on the offenses for which the defendant was extradited. *See United States v. Diwan,* 864 F.2d 715 (11th Cir. 1989); *United States v. Verdugo-Urquidez,* 939 F.2d 1341 (9th Cir. 1991); *United States v. Rausher,* 119 U.S. 407 (1886); *United States v. Kahn,* 993 F.2d 1368 (9th Cir. 1993). The defendants invoked the rule of specialty in objecting to their prosecution for offenses for which they claimed they were not extradited.

However, a sentence is not alterable at the will of the Government. The Government has not cited any authority which would provide the Court the power to modify the Defendant's sentence. In the instant case the Defendant's trial is concluded, and the Court has entered a judgment and sentence. The rule of specialty is being asserted by the Government not to limit the offenses for which the Defendant can be prosecuted, but rather to modify a valid judgment of the Court.

The circumstances under which a district court may modify or vacate a sentence are strictly limited by statute and the Federal Rules of Criminal Procedure. Under 18 U.S.C. § 3582:

> The court may not modify a term of imprisonment once it has been imposed except that –
>
> (1) in any case –
>
> . . .
>
> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.

The proviso that a court may modify a sentence when "expressly permitted by statute" refers to situations where a defendant is incarcerated pursuant to a "plainly illegal sentence." *See* Fed. R. Crim. P. 35 advisory committee's notes; *see also United States v. Diaz-Clark,* 292 F.3d 1310, 1316 (11th Cir. 2002). The drafters of the Federal Rules of Criminal Procedure explicitly assumed that a defendant detained pursuant to such sentence "could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed." Fed. R. Crim. P. 35 advisory committee's notes. The United States' request for resentencing is clearly not made pursuant to § 2255 to correct an illegal sentence.

Rule 35 outlines three circumstances in which a district court may correct or reduce a sentence after its imposition. Section (a) allows for correction of a sentence upon remand back to the district court after the sentence has been appealed under 18 U.S.C. § 3742. *See* Fed. R. Crim. P. 35. Section (b) allows

for a reduction of a sentence upon motion by the Government for substantial assistance. *See* Fed. R. Crim. P. 35(b). Section (c) allows the sentencing court, within seven days after the imposition of the sentence, to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c).

Sections (a) and (b) clearly do not apply to the instant case. Additionally, the Court cannot re-sentence the Defendant pursuant to section (c). The Eleventh Circuit Court of Appeals has held that the seven-day limitation contained in Rule 35(c) is a jurisdictional restriction. *See Diaz-Clark,* 292 F.3d at 1317; *United States v. Morrison,* 204 F.3d 1091, 1093 (11th Cir. 2000). Therefore, a court's modification of a sentence outside of this seven-day period is "an action taken without the requisite jurisdiction, and is a legal nullity." *Diaz-Clark,* 292 F.3d at 1317. Accordingly, as the United States' request was made more than seven days after the sentence was imposed, the Court is without jurisdiction to modify Defendant's sentence under Rule 35.

Furthermore, the *Diaz-Clark* Court addressed the issue of whether a district court has an "inherent authority" to modify a sentence outside of the time period specified in Rule 35(c). *See id.* After a review of the caselaw from other circuits, the Eleventh Circuit Court of Appeals determined that district courts do not have such "inherent authority." *See id.* Relying on the Supreme Court case of *Carlisle v. United States,* 517 U.S. 416 (1996), the *Diaz-Clark* Court stated that

federal courts "'have no more discretion to disregard the [Federal Rules of Criminal Procedure's] mandate than they do to disregard constitutional or statutory provisions.'" *Diaz-Clark,* 292 F.3d at 1318, (quoting *Carlisle v. United States,* 517 U.S. 416, 426 (1996). Accordingly, the Court cannot modify the Defendant's sentence pursuant to any "inherent authority."

A review of extradition caselaw reveals a case factually similar to the instant case. *See United States v. Bakhtiar,* 964 F. Supp. 112 (S.D.N.Y. 1997). In *Bakhtiar,* the defendant was convicted in New York of thirteen counts including conspiracy, bank fraud, wire fraud, money laundering, illegal monetary transactions and possession of forged checks. *See id.* at 113. He was sentenced to 46 months imprisonment and released on bail during the pendency of his appeal. *See id.* While on bail he was arrested in Switzerland on unrelated charges and was detained there until he finished serving his Swiss sentence. *See id.* During that time, the Second Circuit Court of Appeals affirmed his conviction. *See id.*

After his release from Swiss custody, the United States sought his extradition on the thirteen counts of conviction. *See id.* The Swiss Federal Court allowed the defendant's extradition for all counts except money laundering and found that the United States should impose a new sentence punishing defendant for all counts except money laundering. *See id.* After the defendant's extradition, the United States and the defendant requested the court to re-sentence the

defendant for the non-money laundering offenses. *See id.*

The court found that under 18 U.S.C. § 3582(c) it could not re-sentence the defendant. *See id.* at 114. Additionally, the court determined that re-sentencing was prohibited under the constitutional doctrine of separation of powers. Specifically the court found that:

> the [sentence] stands as a conclusive adjudication, binding every department of our government. It is not subject to alteration, except under particular circumstances, which do not apply here. And its terms are not a medium of exchange or barter to be traded out as suits the executive department in whatever negotiation, for the executive department has no power to compel a court to alter its judgment.

Id.

The reasoning from the *Bakhtiar* opinion is applicable to the instant case. The Defendant's sentence is a final judgment of the Court and cannot be modified without appropriate statutory authority. The relevant statutory provisions, Rules of Court, and decisions do not give the Court the authority to re-sentence the Defendant.

Based on the foregoing, the Court **RULES** that the United States Renewed Motion for Re-Sentencing (Doc. No. 1928) is **DENIED**.

DONE AND ORDERED at Orlando, Florida, this 1st day of ~~July~~ August, 2002.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
All Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs-

SHOLAM WEISS

6:98-CR-99-ORL-19A

Joel Hirschhorn, Esquire,
Retained
2600 Douglas Road
Douglas Centre-
Penthouse One
Coral Gables, FL 33134

**** AMENDED AND REENTERED ****
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty on Count 1 thru and including 12, 14 thru and including 49, and 64 thru and including 92 of the Indictment. Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC 1962(c)	Racketeering	September 25, 1995	One
18 USC 1962(d)	Racketeering Conspiracy	April 28, 1998	Two

18 USC 1962(d)	18 USC 1343, 1346 and 18 USC 2	September 25, 1995	3 thru 10, 32 thru 36, 72 thru 80 and 86 thru 90
18 USC 2314 and 18 USC 2	18 Interstate Transportation of Stolen Property	March 23, 1994	11, 12, 14 thru 31 and 37 thru 39
18 USC 1956(a)(1)(a) and 18 USC 1956(a)(1)(B)	Money Laundering	October 28, 1994	42, 45 thru 47, 81 and 82
18 USC 1956(a)(1)(a) and 18 USC 1956(a)(1)(B)	Money Laundering	October 28, 1994	40 thru 49, 64 thru 71, and 83
18 USC 1957 and 18 USC 2	Money Laundering	July 27, 1994	81 thru 85
18 USC 1001 and 18 USC 2	False Statements	August 3, 1995	91 and 92

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs

and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence: February 15, 2000

Defendant's Soc. Sec. No.	[Social Security Number Omitted]
Defendant's Date of Birth:	[Date Of Birth Omitted]
Deft's U.S. Marshal No.:	32610-054

Defendant's Mailing Address:
[Home Address Omitted]
New York, NY (Last Known)

Defendant's Residence Address:
(Unknown – Fugitive)

*/s/ Patricia C. Fawsett**
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

February 22, 2000

* This amended and reentered judgment is made pursuant to the Order of the Court entered on July 16, 2009, as Doc. No. 189 In *Weiss* v. *Yates*, Case No. 5:02:cv-204-Oc-10GRJ Vacating and directing reentry of the original judgment entered by the Hon. Patricia C. Fawsett on February 22, 2000 as Doc. No. 1372 in this action.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHT HUNDRED AND THIRTY-FIVE (835) YEARS. This term shall consist of terms of 20 years as to each of Counts 1 and 2, such

terms to run concurrent with one another but consecutive to all other counts; and terms of 20 years as to each of Counts 40 thru 49, 64 thru 71, and 81 thru 83, terms of 10 years as to each of Counts 11, 12, 14, thru 31, 37 thru 39, 84, and 85, and terms of 5 years as to each of Counts 3 thru 10, 32 thru 36, 72 thru 80, 86 thru 90, 91 and 92, all such terms of imprisonment to run consecutive to one another and consecutive to Counts 1 and 2.

The Court recommends to the Bureau of Prisons:

The defendant is a fugitive and on his capture shall be remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete

written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at anytime at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14. If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$4,000.00	**$123,399,910.00**	**$125,016,656.00**

The Special Assessment shall be due immediately.

FINE

A Fine in the amount of $123,399,910.00 is imposed.

RESTITUTION

Restitution in the amount of $125,016,656.00 is hereby ordered. The defendant shall make restitution to the following victims in the amounts listed below.

Name of Payee
Donna Lee Williams Commissioner of Insurance for the State of Delaware as a Receiver for National Heritage Life Insurance Company

(in liquidation)
950 South Winter Park Drive, Suite 200
Casselberry, FL 32707
ATTN: Terry Craig

Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
$125,016,656.00	$125,016,656.00	

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. § 3664(f)(3)(B), the court orders nominal payments and this is reflected in the Statement of Reasons page. Restitution in the amount of **$125,016,656.00** is hereby ordered jointly and severally.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. § 3664(f)(3)(B), the court orders nominal payments and this is reflected in the Statement of Reasons page.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified as subject to forfeiture.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except, the Court grouped all counts together

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 42

Criminal History Category: III

Imprisonment Range: 360 months to Life Months

Supervised Release Range: 2 to 3 years

Fine Range: $ 25,000 to $123,399,910

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $125,016.656

[ ] The court finds pursuant to 18 U.S.C. § 3664(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a

restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

[ ] Restitution is not ordered because:

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i); pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii), it has been determined that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A), the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to

the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Due to the magnitude and repeated fraudulent acts of this defendant he should be removed from society permanently and the sentence meets the goals of 18 U.S.C. § 3553.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance. [Departure to Level *]

[ ] for the following reason(s)

Sholam Weiss

DOCKET NO: 98-99-CR-ORL-19A

Sholam Weiss, on November 1, 1999, you were found guilty by a jury trial of Count One of the Indictment charging you with Racketeering, in violation

of Title 18, United States Code, Section 1962(c); Count Two of the Indictment charging you with Racketeering Conspiracy, in violation of Title 18, United States Code, Section 1962(d); Counts 3-10, 32-26, 72-80, and 86-90 of the Indictment charging you with Wire Fraud, in violation of Title 18, United States Code, Sections 1343 and 1346; Counts 11-12, 14-31, and 37-39 of the Indictment charging you with Interstate Transportation of Stolen Property, in violation of Title 18, United States Code, Section 2314; Counts 40-49, 64-71, and 83 of the Indictment charging you with Money Laundering, in violation of Title 18, United States Code, Section 1956; Counts 84 and 85 of the Indictment charging you with Money Laundering, in violation of Title 18, United States Code, Section 1957; Counts 91 and 92 of the Indictment charging you with Making False Statements, in violation of Title 18, United States Code, Section 1000.

We have now reached the stage in the proceedings where it is my duty to address several questions to you and your attorney and the counsel for the government:

Rule 32 Issues

(Questions to be posed to the defendant, the defendant's attorney and the attorney for the government:)

Have you had the opportunity to read and discuss the presentence report?

Do you have any objections as to the factual accuracy of the report?

Do you wish to make any objections to the probation officer's application of the guidelines?

The Court adopts the factual statements contained in the presentence report as to which there is no objection, and, as to controverted factual statements, the Court adopts the position of the probation office as stated in the addendum or as noted by the Court in the presentence report. Therefore, the Court determines that the applicable guidelines are:

Findings of Fact and Application of Guidelines to Facts

Total Offense Level 42

Criminal History Category III

360 months to Life imprisonment, however the statutory maximum is 865 years.

2 To 3 years supervised release

$125,016,656 restitution

$25,000.00 to $123,399,910 fine

$4,000 special assessment

SENTENCE

Rule 32 Issues

(Questions to be posed to the defendant, the defendant's attorney and the attorney for the government:)

Do you know of any reason why this Court should not now proceed with imposition of sentence?

Do you wish to make a statement or to present any information in mitigation of the sentence?

The Court, having asked the defendant why judgment should not now be pronounced, and no cause to the contrary appearing to the Court, and the defendant and his attorney having been given an opportunity to make a statement on his behalf, and the Court having reviewed the presentence report, and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Sholam Weiss, is hereby:

Imprisonment

Committed to the custody of the Bureau of Prisons to be imposed for a term of 835 years. This term shall consist of terms of twenty years as to each of counts 1 and 2 such terms to run concurrent with another but consecutive to all other counts; and terms of twenty years as to each counts 40-49, 64-71, and 81-83, terms of ten years as to each of counts 11, 12, 14-31, 37-39, and 84-85 and terms of five years as to each of counts 3-10, 32-36, 72-80, 86-90, and 91-92, all such terms to run consecutive to one another and consecutive to counts 1 and 2.

Supervised Release	Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.
Special Conditions	While on supervised release, the defendant shall comply with the standard conditions adopted by the Court in the Middle District of Florida.
Mandatory Drug Testing	The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter, as directed by the Probation Officer.
Fine	It is further ordered that the defendant shall pay to the United States a fine of $123,399,910.00 which shall be due immediately.
Special Assessment	It is further ordered that the defendant shall pay to the United States a special Assessment of $4,000, which shall be due immediately.
Mandatory Restitution	The mandatory restitution provisions of 18 U.S.C. § 3663A apply in this case. It is therefore ordered that the defendant shall make restitution to Donna Lee Williams, Commissioner of Insurance for the State of Delaware as a receiver for National Heritage Life Insurance Company in Liquidation, 950 S. Winter Park Drive, Suite 200, Casselberry, Florida 32707,

Attention: Terry Craig in the amount of $125,016,656, which shall be due immediately.

Restitution shall be paid jointly and severally.

Forfeiture It is further ordered that the defendant shall forfeit to the United States those assets previously identified as subject to forfeiture.

To the extent the law views the guideline range exceeds 24 months the reason for imposing this sentence due to the magnitude and repeated fraudulent acts of this defendant, for which he should be removed permanently from society. The sentence meets the goals of 18 U.S.C. § 3553.

Reasons for Sentence The Court finds no reason to depart from the sentence called for by application of the guidelines, inasmuch as the facts as found are the kind contemplated by the Sentencing Commission.

Final Objections The Court having pronounced sentence, does counsel for the defendant or Government have any objections to the sentence or to the manner in which the Court pronounced sentence, other than those previously stated for the record?

Remand The defendant is hereby a fugitive and on his capture he shall be remanded to the custody of the United

States Marshal to await designation by the Bureau of Prisons.

Notice of Appeal of Sentence and/or Verdict

You are now advised that it is your right to appeal from the judgment and sentence within ten (10) days from this date or from the date the judgment is recorded, whichever is later. Failure to appeal within the ten-day period shall be a waiver of your right to appeal. The government may file an appeal from this sentence. You are also advised that you are entitled to assistance of counsel in taking an appeal, and if you are unable to afford a lawyer, one will be provided to you.

Instructions to Clerk

The Clerk is instructed to attach this sentencing statement to the Judgment and Commitment Order.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13777-EE

SHOLAM WEISS,

Petitioner-Appellant,

versus

STAN YATES,
Warden, FCC Coleman,

Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul 12, 2010)

BEFORE: BIRCH and BARKETT, Circuit Judges and BUCKLEW*, District Judge.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

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* Honorable Susan C. Bucklew, United Stated District Judge for the Middle District of Florida, sitting by designation.

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

18 U.S.C. § 3553(a). Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[11]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. § 3582(c)

Modification of an Imposed Term of Imprisonment. – The court may not modify a term of imprisonment once it has been imposed except that –

(1) in any case –

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that –

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is

not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under

color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action

against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise

open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of

the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA

[Relevant Provisions]

Article 9
Convictions in Absentia

If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defense or that there are adequate remedies or additional proceedings available to the person after surrender.

Article 11
Supplementary Information

(1) If, at any stage of the extradition proceedings, the Requested State considers that the information furnished in support of the request for the extradition of a person is not sufficient to fulfill the requirements for extradition, that State may request the necessary supplementary information and may fix a reasonable time-limit for the receipt thereof.

(2) If the supplementary information furnished is not sufficient or is not received within the time specified, and if, as a consequence, the person sought is

discharged, such discharge shall not preclude the Requesting State from making a new request for the extradition of the person sought.

(3) Where the person sought is discharged from custody, the Requested State shall notify the Requesting State as soon as practicable.

Article 19
Rule of Specialty

(1) A person extradited under this Treaty may not be detained, tried, punished, or subjected to any other restriction of his personal liberty in the Requesting State in relation to an offense, except for:

a) an offense for which extradition has been granted or an offense based on the same facts on which extradition was granted, provided such offense is extraditable or is a lesser included offense; or

b) an offense committed after the surrender of the person; or

c) an offense for which the executive authority of the Requested State consents to the person's detention, trial, punishment, or other restriction of personal liberty. For this purpose, the Requested State may require the submission of the documents called for in Article 10 and a legal record of any statements made by the extradited person in respect of the request for consent. The person extradited may be detained by the Requesting State for 90 days, or for such longer

period of time as the Requested State may authorize, while the request is being processed.

(2) A person extradited under this Treaty may not be extradited to a third State for an offense committed prior to his surrender unless the surrendering State consents.

(3) The restrictions set forth in paragraphs 1 and 2 of this article shall not apply if the extradited person:

a) leaves the territory of the Requesting State after extradition and voluntarily returns or is lawfully returned to it; or

b) does not leave the territory of the Requesting State within 30 days from the day on which that person is free to leave.

(4) The provisions of this article shall not prevent the Requesting State from taking measures necessary under its law to effect the deportation of the extradited person from its territory or to prevent expiration of a right of action through lapse of time.

Article 23
Consultation

The Ministry of Justice of Austria and the United States Department of Justice may consult with each other directly in connection with the processing of individual cases and in furtherance of maintaining and improving procedures for the implementation of this Treaty.

DONE at Washington, in duplicate, this eighth day of January, 1998, in the German and English languages, both texts being equally authentic.

For the Government of the Republic of Austria:
Dr. Nikolaus Michalek m.p.

For the Government of the United States of America:
Janet Reno m.p.

Protocol No. 7 to the 1950 European Convention on Human Rights (ECHR), E.T.S. 117, *entered into force* Nov. 1, 1988.

[Relevant Provision]

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

REPUBLIK [LOGO] ÖSTERREICH

DR. ALFRED GUSENBAUER
BUNDESKANZLER

The Honorable George W. BUSH
President of the United States
The White House
1600 Pennsylvania Ave NW
Washington DC 20500
United States of America

Vienna, 22 October 2008

Mr. President,

Our respective justice departments have been seized with the matter of Mr. Sholam Weiss for almost a decade.

In 2002, the Republic of Austria granted the extradition of Mr. Weiss, trusting in assurances from the United States that Mr. Weiss would receive both a re-sentencing and a full appeal of his conviction and sentence. However, after 6 years he has received neither a re-sentencing nor a full appeal, resulting in ongoing correspondences between our governments.

One possibility to solve this issue rapidly would be a Presidential commutation of the sentence handed down to Mr. Weiss to 10 years. This would correspond to the maximum sentence had he been tried in Austria for the same crimes. I would be most obliged if you could positively consider such a step.

An additional consideration for the commutation is that, as I have been informed, Mr. Weiss has had

surgery for colon cancer and is in poor health, and is willing to accept a commutation to 10 years.

Sincerely yours,

/s/ A. Gusenbauer

CERTIFIED TRANSLATION OF
THE GERMAN ORIGINAL

DR. PETER KARLBERGER
Allg. beeld. und gerichtlich
zertifizierter Dolmetscher
für die englische Sprache

* WIEN *

==Federal Ministry
of European
and International
Affairs

GZ. BMeiA-US.4.30.01/0033-IV.1/2008

To the

Embassy of the United States of America

Boltzmanngasse 16

1090 Wien

Note Verbale

The Federal Ministry of European und International Affairs kindly presents its best regards to the Embassy of the United States of America, and is honored to give its view on the Note No. 36 from the esteemed Embassy dated March 6, 2008, as follows:

With regard to questions 1. through 3.:

The Republic of Austria acted upon the assumption of the validity of the principle of specialty. In light of the notes of the U.S. Department of Justice delivered to the Federal Ministry of Justice concerning the American legal situation, it had been the understanding of the Republic of Austria that compliance with the principle of specialty would lead to a re-sentencing by an American judicial decision, and that the newly

assessed sentence would be subject to a full appeal in accordance with the American legal system.

Based on these assumptions, which are based on the communications of the U.S. Department of Justice, Austria renounced its right to require any extra assurances of an appeal when authorizing the extradition. Thus, the extradition of Sholam WEISS was effectuated trusting that the principle of specialty would be observed by means of an American judicial decision concerning the assessment of the sentence, and that this would inevitably lead to a right of appeal.

Regarding question 4.:

To begin with, Austria is not of the opinion that any assurances have thus far been disregarded by the American side, because the present Habeas-Corpus proceedings in the United States intending the adaption of the sentence to comply with the principle of specialty are still pending.

However, Austria continues to hold the view that the United States of America has thus far not fulfilled its obligation to comply with the principle of specialty. The American side is obligated to ensure that the imposed sentence will be newly assessed by means of an American judicial decision in order to correspond to the partial rejection (i.e. concerning count 93) of the extradition. Compliance with the principle of specialty is independent of the intention of the concerned person, and would be binding even if the concerned person would declare itself against a reassessment of the sentence.

Austria does regret that the Solicitor General did not authorize the American government's appeal dated August 29, 2002, against the order of the U.S. District Court, Middle District of Florida, Orlando Division dated August 1, 2002, denying the American government's motion for re-assessment of the sentence in accordance with the principle of specialty, and that the matter could therefore not be brought before the U.S. Court of Appeals for the Eleventh Circuit.

The Federal Ministry of European and International Affairs takes this opportunity to renew the assurance of its highest esteem to the Embassy of the United States of America.

Vienna, June 18, 2008

(Seal of the Federal Ministry of European and International Affairs)
(Illegible autographic signature)

I hereby affirm under oath that the preceding translation is in complete conformity with the original/copy photostatic copy – affixed hereto/ presented herewith.

Vienna, July 17, 2008

DR. PETER KARLBERGER
Allg. beeld. und gerichtlich
zertifizierter Dolmetscher
für die englische Sprache

* WIEN *

[SEAL]

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

May 14, 2002

Dr. Stephan Benner
Abteilung für Internationale
Rechtshilfe und Auslieferung
Bundesministerium für Justiz
Museumstraße 7
A-1070 Wien
Austria

Dear Dr. Benner:

This is to confirm and restate the contents of my letter, dated 8 February 2002. The issue addressed therein was the effect of an Austrian finding of extraditability with a rule of specialty condition that, upon Weiss' surrender to the United States, he not be proceeded against for Count 93 of the Indictment.

If Weiss is extradited subject to the condition that he not be punished for offenses involving false statements to government officials or in judicial proceedings, the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition. In our opinion, this would result in Weiss being permitted to file a full appeal on all issues, *including the guilty verdict*, errors committed during the trial, constitutional issues, and his

sentence. Under United States law, a defendant does not separately appeal his verdict and a sentence. Any appeal is from the final judgment, which contains both the finding of guilt and the imposition of punishment. Furthermore, in any proceedings before any United States court, the United States would take the position that the re-sentencing permits Weiss to appeal both the sentence and the guilty verdict.

Therefore, if the Austrian Court were to order Weiss extradited on all counts of conviction except Count 93, as indicated in the Order of the Vienna Regional High Court, it is our opinion that Weiss would be permitted to appeal the guilty verdict on Counts One through Ninety-Two, as well as the new sentence imposed on those Counts. The outcome of this re-sentencing, as well as the outcome of the appeal, cannot be predicted.

Again, thank you for your assistance in this matter.

Sincerely,

Mary Ellen Warlow
Director
Office of International Affairs

By: /s/ _____
Ernestine B. Gilpin
Associate Director

[SEAL]

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

February 8, 2002

Dr. Stephan Benner
Abteilung für Internationale
Rechtshilfe und Auslieferung
Bundesministerium für Justiz
Museumstraße 7
A-1070 Wien
Austria

Dear Dr. Benner:

Re: U.S. Request for Extradition of Shalom WEISS

The Office of the United States Attorney for the Middle District of Florida has asked that this office provide the Austrian Ministry of Justice with the following information as to how U.S. authorities would proceed before courts of the United States if Austria determines that Mr. Weiss is not extraditable for specific charges for which he was convicted and sentenced involving false statements to government officials and/or in judicial proceedings.

Under U.S. law as set forth in international agreements and, specifically, in the Treaty between the United States and the Republic of Austria, the rule of specialty would require that a person extradited to the United States not be detained, tried or

punished for an offense other than that for which extradition has been granted. Therefore, if Austria grants extradition for some Counts and denies extradition of Mr. Weiss for other Counts of the Indictment on which he was convicted, Mr. Weiss could not be punished for those Counts for which extradition is denied.

The sentence imposed by the U.S. District Court for the Middle District of Florida punishes Mr. Weiss for all Counts of the Indictment, including those involving false statements to government officials and/or in judicial proceedings. If Austria grants extradition to the United States for Mr. Weiss, but imposes a rule of specialty condition that he not be detained, tried or punished for offenses involving false statements to government officials and/or in judicial proceedings, any sentence imposed as punishment for those offenses could not be carried out. Accordingly, the rule of specialty would require that the court vacate the original sentence and re-sentence Mr. Weiss or otherwise give legal effect to the rule by relieving Mr. Weiss of the penalty imposed for those offenses. To secure compliance with the rule of specialty, the United States Attorney's Office for the Middle District of Florida would file a motion in U.S. District Court for the Middle District of Florida requesting that the court re-sentence Mr. Weiss, considering only those Counts of the conviction for which he is extradited from Austria. The United States would maintain that this re-sentencing is both

required and appropriate before any court considering this matter.

Finally, upon Mr. Weiss' re-sentencing, the United States Attorney's Office for the Middle District of Florida would not challenge a claim by Weiss, before any court considering the matter, to a full right of appeal of his conviction on all counts for which he is extradited and to appeal whatever sentence is imposed on those Counts, assuming Mr. Weiss complies with all applicable rules of procedure.

Thank you for your assistance in this matter.

Sincerely,

Mary Ellen Warlow
Director
Office of International Affairs

By: /s/ Ernestine B. Gilpin
Ernestine B. Gilpin
Associate Director

(2)

No. 10-384

Supreme Court, U.S.
FILED
NOV 7 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

SHOLAM WEISS, PETITIONER

v.

STAN YATES, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had authority under 28 U.S.C. 2241 to vacate a judgment of conviction and resentence petitioner in order to comply with the condition on which petitioner was extradited after he fled to Austria during his trial.

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In the Supreme Court of the United States

No. 10-384

SHOLAM WEISS, PETITIONER

v.

STAN YATES, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 375 Fed. Appx. 915. The opinion of the district court (Pet. App. 14-45) is unreported, but is available at 2008 WL 5235162.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2010. A petition for rehearing was denied on July 12, 2010 (Pet. App. 73-74). The petition for a writ of certiorari was filed on September 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was

convicted on multiple charges of racketeering, wire fraud, interstate transportation of stolen funds, money laundering, the making of false statements, and obstruction of justice. Pet. App. 55-56. Petitioner fled during jury deliberations, and he was sentenced in absentia to 845 years of imprisonment. His direct appeal was dismissed because he remained a fugitive. Petitioner was later apprehended in Austria and extradited to the United States. Petitioner filed this habeas petition under 28 U.S.C. 2241, seeking release from custody on the ground that the United States had breached the terms of his extradition. The district court held that Austria had denied extradition with respect to petitioner's conviction for obstruction of justice (Count 93), for which petitioner had received a sentence of ten years of imprisonment; the court therefore granted the petition in part, vacated the judgment of conviction, reentered the judgment as to the counts other than Count 93, and reduced the sentence to 835 years. Pet. App. 14-46. The court of appeals affirmed. *Id.* at 1-5.

1. In 1998, petitioner was indicted along with several others for offenses relating to a decade-long scheme to defraud the National Heritage Life Insurance Company (NHLIC) of millions of dollars and to use the stolen funds to commit further frauds. The scheme also involved laundering money stolen from NHLIC through a series of property purchases and resales. See *United States* v. *Weiss*, 467 F.3d 1300, 1303 (11th Cir. 2006), cert. denied, 552 U.S. 891 (2007). Petitioner was charged, in a total of 78 counts, with racketeering and racketeering conspiracy, see 18 U.S.C. 1962(c) and (d); wire fraud, see 18 U.S.C. 2, 1343, and 1346; interstate transportation of stolen property, see 18 U.S.C. 2 and 2314; money laundering, see 18 U.S.C. 1956 and 1957;

making false statements, see 18 U.S.C. 2 and 1001; and in Count 93, obstruction of justice, see 18 U.S.C. 1503. Petitioner attended his jury trial, which lasted eight months, until the jury retired to deliberate. At that point, he fled and failed to appear thereafter. Pet. App. 2, 18-19; see Fed. R. Crim. P. 43(c) (defendant's voluntary absence after trial has begun waives his right to be present).

Petitioner was convicted of all charges and was sentenced to a total of 845 years of imprisonment, to be followed by three years of supervised release. Pet. App. 19, 59. He was also fined $123,399,910 and ordered to pay $125,016,656 in restitution. *Id.* at 19, 57-59, 62. The total term of imprisonment included a ten-year term on Count 93, the obstruction of justice count. *Id.* at 19. Petitioner's counsel filed a timely notice of appeal, but the court of appeals dismissed the appeal on the basis of the fugitive disentitlement doctrine. *Id.* at 19-20; see *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-240 (1993); *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam).

2. In October 2000, nearly a year after his flight, petitioner, a citizen of the United States, was found in Austria and placed under provisional arrest at the request of United States authorities. On December 18, 2000, the United States made a formal extradition request pursuant to the extradition treaty between the Republic of Austria and the United States. Pet. App. 20; see Extradition Treaty with Austria, U.S.-Austria, Jan. 8, 1998, S. Treaty Doc. No. 105-50 (1998), T.I.A.S. No. 12916 (Treaty).

In connection with the extradition proceedings, an Austrian lower court sought assurances that petitioner would be afforded an appeal if extradited to the United

States. In 2001, in an effort to provide the requested assurances, the United States sought to reinstate petitioner's appeal and also requested that the district court vacate petitioner's judgment. Both courts denied the motions. The Austrian lower court consequently denied extradition, but that decision was reversed by the Austrian Supreme Court. On remand, the lower court ruled that petitioner could be extradited on all counts of conviction, except Count 93. Gov't C.A. Br. 10-13; Pet. App. 20-21 (describing Austrian judicial proceedings).

In June 2002, Austrian authorities extradited petitioner to the United States with respect to all the offenses of which he had been convicted, with the exception of Count 93. App., *infra*, 1a (official diplomatic note informing the United States of the decision to extradite petitioner "to serve the sentence imposed by [the district court's] verdict," excluding the "portion of the sentence due to Count 93"). Austrian authorities denied extradition on Count 93 because no crime under Austrian law corresponds to obstruction of justice, and therefore the Treaty's requirement of dual criminality was not satisfied. Pet. App. 15-16, 20-21.

Under the rule of specialty, which is incorporated into the Treaty, see Pet. App. 86-87, a requesting state may not punish an extradited person for an offense on which extradition has been denied, see *id.* at 15 n.4. In an effort to comply with the rule of specialty and avoid punishing petitioner on Count 93, the government moved for resentencing. The district court denied the motion on the ground that it lacked authority, in the context of petitioner's criminal case and in the absence of a postconviction motion (such as a Section 2255 motion), to resentence petitioner. *Id.* at 46-54 (explaining

that the circumstances in which Rule 35 permitted resentencing were not present); Gov't C.A. Br. 17.

3. In July 2002, petitioner filed a habeas petition under 28 U.S.C. 2241, alleging that the United States had deliberately misrepresented American law to Austrian authorities in derogation of its obligations under the Treaty, that the resulting extradition was in violation of the Treaty, that United States courts consequently lacked jurisdiction to enforce his sentence, and that he should be released from custody. Pet. App. 21. The district court initially denied the petition, *id.* at 22, but it then granted reconsideration and allowed discovery and further briefing. *Id.* at 23-24.

During the discovery proceedings in the district court, the United States, with the court's approval, sent a formal diplomatic inquiry to Austria concerning any assurances on which the Austrian government had relied in granting extradition. Pet. App. 26. The Austrian government responded that it had denied extradition on Count 93 and that it had acted in reliance on the rule of specialty, which is incorporated in the Treaty. *Id.* at 92-93. As a result, the diplomatic note stated, Austria expected that petitioner would be resentenced "to correspond to the partial rejection (i.e. concerning count 93) of the extradition." *Id.* at 93. The Austrian government also stated that it understood that petitioner's resentencing would "lead to a right of appeal," *id.* at 92-93; and that in Austria's opinion, the United States had not disregarded any assurances, assuming that the present proceedings ultimately resulted in compliance with the rule of specialty. *Id.* at 93; *id.* at 27-28.

The district court granted petitioner's Section 2241 petition in part and denied it in part. Pet. App. 6-13. The district court first determined, relying on Eleventh

Circuit precedent, that petitioner had standing to assert that his custody violated the Treaty insofar as he alleged a violation of the rule of specialty, subject to Austria's right to waive any such violation if it so chose. *Id.* at 29 (citing *United States* v. *Puentes*, 50 F.3d 1567, cert. denied, 516 U.S. 933 (1995)). The court also noted that 28 U.S.C. 2241, which authorizes challenges by prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States," expressly provides an avenue for collaterally attacking a conviction and sentence on the basis of a treaty violation. 28 U.S.C. 2241(c)(3).

Turning to the Austrian government's diplomatic note, the court concluded that—as the United States had consistently acknowledged—the Austrian authorities had denied extradition on Count 93 and that the Austrian government's concern was that the United States comply with the rule of specialty, which required that petitioner not be punished on Count 93. Pet. App. 32-37. Austria also understood, the court noted, that petitioner would have an opportunity to appeal the judgment after he was resentenced to remove Count 93. *Id.* at 37. The court therefore rejected petitioner's argument that any statements made by the United States about "the procedural device that would result in obedience to the rule of specialty" constituted conditions on petitioner's extradition or were material to the United States' compliance with the rule of specialty. *Id.* at 36; see *id.* at 33-37.

The district court then rejected petitioner's argument that the court had no authority to grant any relief short of complete release. Pet. App. 37-41. The court held that a court adjudicating a Section 2241 petition "has a full arsenal of remedies to correct unlawful detentions short of ordering outright release where a lesser

directive will suffice to right the wrong," *id.* at 39, and that it would be erroneous to grant more relief than necessary to comply with the rule of specialty and avoid violating the Treaty. *Id.* at 40-41 (citing *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)).

The district court accordingly held that petitioner should be permitted to amend his petition to request that the court vacate the judgment of conviction and reenter judgment on the counts other than Count 93, thereby enforcing the rule of specialty. Pet. App. 43-44. The reentry of judgment would also restart the time for appeal, thereby permitting petitioner to appeal his convictions and sentence. This remedy, the court noted, had previously been approved by the Eleventh Circuit in other situations in which the court found that a defendant should have the opportunity to pursue an appeal that had previously been foreclosed, and "[g]iven the procedural and substantive posture of this case, it seems most appropriate to utilize this technique here as well." *Id.* at 44.

Petitioner subsequently amended his petition to include a request for the relief outlined by the district court, while also renewing his argument that the court lacked authority to vacate and reenter the judgment in a proceeding under Section 2241. The court rejected that argument, explaining that it had already concluded that complete release was an inappropriate remedy, "and if a lesser alternative is unavailable, the inexorable result would be dismissal" of the petition. Pet. App. 10. The court therefore entered an order implementing the disposition it had earlier described. *Id.* at 11-13; 55-72.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-5. The court found "no clear error" in the district court's interpretation of the

diplomatic communications at issue. *Id.* at 4. The court therefore concluded that the remedy ordered by the district court—the elimination of the sentence for Count 93, the reentry of petitioner's sentence without that count of conviction, and the resulting opportunity for a full appeal of his conviction and sentence—was appropriate. The court rejected petitioner's argument that the district court had no authority to order any remedy short of complete release and that only Section 2255 authorized correcting petitioner's sentence, explaining that "[w]hether construed under § 2255 or § 2241, the district court had jurisdiction to issue the relief it did given the unique facts of this case." *Id.* at 4 n.3.

The court of appeals therefore affirmed the district court's conclusion that petitioner could proceed to appeal his reentered conviction and recalculated sentence. The government, the court observed, had stated that it "does not and will not oppose granting [petitioner] a full appeal of his conviction and the recalculated sentence without Count 93." Pet. App. 4. The court held that petitioner's direct appeal, which had been docketed and stayed pending the resolution of the instant case, could now proceed. *Id.* at 5.

ARGUMENT

Petitioner renews his contention (Pet. 14-34) that the district court lacked authority to vacate and reenter his convictions and resentence him, and that the only remedy available to the courts was to release him altogether and allow him to return to Austria. Petitioner's arguments are without merit. The district court appropriately exercised its broad discretion to dispose of a habeas petition under Section 2241 "as law and justice require." 28 U.S.C. 2243 para. 8. It crafted a remedy that

is closely tailored to, and ensures compliance with, the only condition on which petitioner was extradited—namely, that the United States honor the rule of specialty by ensuring that petitioner not be convicted or sentenced on Count 93. The court of appeals' decision affirming the district court's remedial order does not conflict with the decisions of this Court or any other court of appeals. Moreover, petitioner acknowledges (Pet. 1) that the circumstances of this case are "unique" and are unlikely to arise with any frequency. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 14-20) that the district court was obligated to release him entirely because it had no authority under 28 U.S.C. 2241 to vacate his conviction on Count 93 or to modify his sentence. Petitioner is incorrect.

a. Petitioner properly brought this challenge to his custody under Section 2241, which permits a defendant to assert that she is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). As petitioner points out, he does not contend that his "sentence was *imposed* in violation of" the laws of the United States, and so he did not bring a challenge to his conviction and sentence under Section 2255, the primary vehicle through which a federal prisoner may attack the imposition of his conviction and sentence. Pet. 15. Rather, petitioner contends that his continued custody violates the condition on which he was extradited. Petitioner's challenge to his custody therefore falls within the ambit of Section 2241(c)(3).

b. A court's power to fashion relief under Section 2241 is not limited in the manner that petitioner contends. Section 2241 is the "primary federal habeas corpus statute," *Zadvydas* v. *Davis*, 533 U.S. 678, 687

(2001), and it authorizes any person to challenge her custody as violating federal law. 28 U.S.C. 2241(c)(3). Section 2243 accordingly confers authority on federal courts to dispose of a habeas petition under Section 2241 "as law and justice require." 28 U.S.C. 2243 para. 8. This language, the Court has confirmed, affords a court "broad discretion * * * in fashioning the judgment granting relief to a habeas petitioner." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987); *In re Bonner*, 151 U.S. 242, 261 (1894) (predecessor of Section 2243 vests a federal court "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*").

The Court has consistently held that Section 2243 "does not limit the relief that may be granted to discharge of the applicant from physical custody." *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968) (holding that Section 2243 permits relief to a defendant who challenged his state conviction after having served his sentence); see *Peyton* v. *Rowe*, 391 U.S. 54, 66-67 (1968) (stating that habeas courts may "fashion appropriate relief other than immediate release," and canvassing cases in which relief declaring one sentence invalid would not have resulted in the petitioner's release). Courts presented with habeas petitions under Sections 2241 and 2243 (and their predecessor statutes) have accordingly granted relief in the nature of modifying or correcting a sentence. See, *e.g.*, *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1446, 1449 (3d Cir. 1991) (Section 2243 permits court to order that sentence be reduced by 39 months), cert. denied, 505 U.S. 1229 (1992); *Bryant* v. *United States*, 214 F. 51, 53 (8th Cir. 1914) (petitioner sought through "habeas corpus wholly to escape the remainder of his term of imprisonment," but the court "properly prevented

this by sending him back for a correction of the [federal] sentence," because "[i]n habeas corpus a court is expressly authorized 'to dispose of the party as law and justice require'" (citation omitted)); see also *Boumediene* v. *Bush*, 553 U.S. 723, 779-780 (2008) (release is not the exclusive remedy in habeas cases, "and is not the appropriate one in every case in which the writ is granted"); *United States* v. *Pridgeon*, 153 U.S. 48, 64 (1894) (where only a portion of petitioner's sentence was invalid, suggesting that lower court on remand could direct that only the valid portion of the sentence be carried out); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.4(4), at 1700 (5th ed. 2005) (Section 2243 permits courts to take "any other action that affects the fact, length, or conditions of existing custody and that is necessary * * * to 'dispose of the matter as law and justice require'") (quoting 28 U.S.C. 2243).[1]

Petitioner nonetheless argues (Pet. 15) that only Section 2255 grants a court the authority to vacate a conviction and modify a sentence. See 28 U.S.C. 2255(a) (Supp. III 2009) (stating that court may "vacate, set aside or correct the sentence"). That argument lacks merit. Although a federal prisoner must ordinarily use Section 2255 to challenge the imposition of his conviction and sentence, Section 2241 may be used for that purpose when Section 2255 is "inadequate or ineffective." See 28 U.S.C. 2255(e) (Supp. III 2009); *Reyes-Requena* v.

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[1] Petitioner argues (Pet. 20), without support, that under Section 2241, a court may not "vacat[e] a conviction and sentence to satisfy treaty obligations." But Section 2241 expressly permits defendants to challenge their custody on the basis of treaty obligations, and Section 2243 para. 8 on its face does not place any limits on the relief that a court may order if it concludes that a treaty has been violated.

United States, 243 F.3d 893, 901 (5th Cir. 2001) (holding that Section 2241 "may be utilized by a federal prisoner to challenge the legality of his or her conviction or sentence" if Section 2255 is inadequate). That rule presupposes that courts have the authority to vacate a conviction and modify a sentence under Sections 2241 and 2243. See, *e.g.*, *United States* v. *Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) ("Courts hearing § 2241 motions have traditionally had the power to vacate or reduce such sentences [imposed in violation of federal law] when necessary to cure these kinds of defects."); see also, *e.g.*, *Simon* v. *United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) (noting previous vacatur of conviction and reduction of sentence in response to Section 2241 petition); *Alamin* v. *Gerlinski*, 73 F. Supp. 2d 607 (W.D.N.C. 1999) (granting relief under Section 2241 by vacating 18 U.S.C. 924(c) conviction and modifying sentence).

The decisions on which petitioner relies are not to the contrary. They stand for the proposition that defendants challenging the *imposition* of their convictions and sentences ordinarily must use Section 2255 to do so, lest Section 2241 be used to circumvent the procedural limitations on Section 2255. See, *e.g.*, *Antonelli* v. *Warden*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008) (stating that "federal prisoners cannot avoid the procedural restrictions on § 2255 motions by changing the caption on their petition to § 2241," and that where Section 2255 is available, a defendant "may proceed under § 2241 only [for] claims outside the scope of § 2255(a)"); *Chambers* v. *United States*, 106 F.3d 472, 474-475 (2d Cir. 1997) (defendant's Section 2255 challenge to the imposition of his sentence, following a Section 2241 challenge to the execution of his sentence, was not a second or successive

motion under 28 U.S.C. 2244); *Valona* v. *United States*, 138 F.3d 693, 694 (7th Cir. 1998) (a petitioner may not "use a petition under § 2241 to call into question the validity of a conviction or sentence that has already been subject to collateral review"); see also *Zayas* v. *INS*, 311 F.3d 247, 256-257 (3d Cir. 2002) (noting that Section 2241 "embrac[es], for example," challenges to the execution of a sentence). These decisions thus do not suggest that intrinsic limitations cabin the relief that a court may order in a properly presented Section 2241 habeas petition.[2]

2. a. Petitioner next contends that the relief ordered by the district court does not comply with the rule of specialty, because Austria "received assurances" from the United States that petitioner would be granted a full resentencing on all counts of conviction. Pet. 1-2, 28, 30-33. To the contrary, the court's decision to vacate petitioner's conviction on Count 93 and to modify his sentence to exclude any punishment for Count 93 (and thereby restart the time for an appeal) fully complied with the rule of specialty. The district court correctly rejected petitioner's assertion that a full resentencing was a condition of petitioner's extradition, and the court of appeals discerned "no clear error" in the district

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[2] Petitioner also relies on *United States* v. *Diaz-Clark*, 292 F.3d 1310, 1311, 1316-1317 (11th Cir. 2002), which held that a district court "without any federal habeas corpus petition before it" may modify a sentence only under the circumstances enumerated in 18 U.S.C. 3582(c)(1)(B) and Federal Rule of Criminal Procedure 35. But *Diaz-Clark* is inapposite here because it did not concern a district court's powers to fashion relief under 28 U.S.C. 2241 or 28 U.S.C. 2255 (Supp. III 2009). In addition, any intra-circuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

court's factual findings on this point, Pet. App. 4. Further review is not warranted.

The only condition that Austria placed on petitioner's extradition arose from its denial of extradition with respect to Count 93. See App., *infra*, 1a (Austria's diplomatic note informing the United States that petitioner would be extradited to "serve the sentence" imposed by the district court, except that "[t]he portion of the sentence due to Count 93 * * * is excluded as concerns extradition."). As a result of that denial, the rule of specialty, as incorporated in the Treaty, Pet. App. 86-87, required that petitioner not be punished for Count 93. The district court correctly held that Austria had confirmed, in a formal diplomatic note, that Count 93 was its sole concern when it ordered extradition. *Id.* at 36-37. That communication stated that, in Austria's view, the Treaty and the rule of specialty would be satisfied if the United States ensured that petitioner's sentence "will be newly assessed * * * in order to correspond to the partial rejection (i.e., concerning [C]ount 93) of the extradition." *Id.* at 93; *id.* at 92 (also noting its "understanding" that petitioner would be able to appeal the new sentence). As the district court correctly found, therefore, any statements made by the United States to Austria about the precise procedural mechanism through which the rule of specialty would be honored (whether through a full resentencing or other vehicle) were immaterial to the United States' only obligation—which was to comply with the rule of specialty by refraining from punishing petitioner on Count 93, however that result was accomplished.[3] *Id.* at 36-37. Petitioner's

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[3] In addition, as the court of appeals held, even if the United States' statements to Austria were considered conditions on extradition, the

assertion (Pet. 32-33) that a resentencing on all counts was a condition of extradition thus challenges the factual conclusions of both courts below and does not warrant review.

b. Petitioner also argues (Pet. 24-25) that "if assurances given under an extradition treaty cannot be fulfilled, the United States is required to order the extradited person's return to the place from which that person was extradited." As an initial matter, the premise of petitioner's argument is incorrect for the reasons stated above; the relief granted by the district court entirely fulfills the condition on which petitioner was extradited. In any event, petitioner's argument is without merit.

Petitioner relies on *Johnson* v. *Browne*, 205 U.S. 309 (1907), in which Canada had refused to extradite Browne, a fugitive, on the charge on which he had been convicted in the United States. The United States subsequently filed a complaint against Browne on entirely different charges and obtained his extradition from Canada for trial on the new charges. When Browne arrived, however, the United States imprisoned him on the original convictions for which extradition had been refused. The Court held that "obtain[ing] the extradition of a person for one offense and then punish[ing] him for another and different offense" violated the treaty and that, under the circumstances, release was an appropriate remedy. *Id.* at 321. The Court did not purport to hold that release is the sole permissible remedy in any case involving a potential violation of an extradition treaty. Rather, release was appropriate in *Johnson* because Canada had refused extradition on the *only* conviction

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district court correctly found that those conditions would not include "a full re-sentencing *on all counts*." Pet. App. 4; *id.* at 35-36.

on which the United States sought to hold Browne after his extradition. Here, by contrast, Austria consented to extradition on all but one of the charges on which petitioner was convicted; its only restriction was that he not be punished on Count 93. The district court correctly concluded that compliance with the Treaty in these circumstances did not require petitioner's complete release.

Indeed, as the district court pointed out (Pet. App. 39-40), it would be inappropriate to grant more relief than necessary to avoid a violation of the Treaty. As this Court has stated, "the general rule," even for constitutional errors, is "that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 721-722 (1990) (disapproving order of release as bearing neither "causal nor proportional relation to any harm caused" by the delay at issue). The resentencing ordered by the district court would satisfy the only conditions on which Austria granted petitioner's extradition. Accordingly, ordering petitioner's release—when Austria expressly agreed to petitioner's extradition on all other counts of conviction—would be a grossly disproportional and unnecessary remedy.

3. Finally, in an apparent effort to demonstrate that release would be the only possible remedy, petitioner argues (Pet. 21-24) that the court of appeals' decision to permit him to pursue an appeal of his sentence and conviction on Counts 1-92 conflicts with principles of procedural default and finality and that the court should have held that petitioner had defaulted all of the claims that he might have raised in an appeal of his convictions.

Permitting an appeal, however, was an appropriate exercise of the courts' remedial discretion, when the government did not oppose granting the appeal, Pet. App. 4, and Austria had indicated that it understood that resentencing petitioner without Count 93 would "lead to a right of appeal," *id.* at 93.

Petitioner argues that because his earlier appeal was dismissed with prejudice under the fugitive disentitlement doctrine, procedural-default rules should categorically bar him from appealing his newly entered conviction and sentence. As petitioner acknowledges (Pet. 23), however, the general rule that claims that should have been raised on direct appeal may not be raised later is "neither a statutory nor a constitutional requirement," but instead is a court-enforced doctrine that protects judicial resources and finality. *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). Under traditional procedural-default principles, see *Lynn* v. *United States*, 365 F.3d 1225, 1243-1244 (11th Cir.) (holding that traditional procedural-default rules apply when a defendant's appeal was dismissed under the fugitive-disentitlement doctrine), cert. denied, 543 U.S. 891 (2004), the court of appeals would not be required to sua sponte raise any procedural-default issue in the absence of any assertion of procedural default by the government. See *Trest* v. *Cain*, 522 U.S. 87, 89 (1997); Gov't C.A. Br. 64-67 (stating that "[t]he United States has no intention of moving to dismiss" petitioner's appeal and that the lower courts would be unlikely to find petitioner's appeal procedurally barred, in light of Austria's understanding that petitioner would receive an appeal of his convictions). Thus, the court of appeals correctly rejected petitioner's argument that he should be re-

leased because any appeal of his convictions would be entirely barred by procedural-default rules.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
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MARCH 2011

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[4] Petitioner's contention (Pet. 34) that his sentence should be reconsidered in light of *United States* v. *Booker*, 543 U.S. 220 (2005), and the factors in 18 U.S.C. 3553(a) is a claim that he should raise in his reinstated appeal. See Pet. App. 4-5.

APPENDIX

LEGAL AND CONSULAR SECTION

Federal Ministry
of Foreign Affairs

File designator 125351/0003e-IV.1/2002

To the
Embassy of the
United States of America
Boltzmanngasse 16
1090 Vienna

Diplomatic Note

The Federal Minister of Foreign Affairs presents its complements to the Embassy of the United States of America and has the honor of informing it, referencing its diplomatic note 125351/0003e-IV.1/02 dated 17 April 2002, that the Federal Minister of Justice, based on a decision of the Higher Regional Court in Vienna dated 8 May 2002, has granted the extradition of Shalom WEISS, an American citizen born 1 April 1954 in Scranton, Pennsylvania, to serve the sentence imposed by verdict 6:98-CR99-ORL-19A of the U.S. District Court for the Middle District of Florida, Orlando Division, based on verdict 98-99 CR-ORL-19A of the same court dated 1 November 1999, for 845 years imprisonment. The portion of the sentence due to Count 93, perjury while a target, is excluded as concerns extradition.

The appropriate American authorities are hereby informed of this.

The Federal Ministry of Foreign Affairs takes this opportunity to reiterate the assurances of its esteem to the Embassy of the United States of America.

Vienna, 17 Apr. 2002

REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF
FOREIGN AFFAIRS

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(3)

Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

No. 10-384

In the Supreme Court of the United States

SHOLAM WEISS,

Petitioner,

v.

STAN YATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

No Case Cited by Respondent Stands for the Proposition that a District Court Has Authority to Re-Sentence a Prisoner Whose Conviction Has Been Final for a Decade When the Prisoner Makes No Claim in His Habeas Corpus Petition that His Conviction or Sentence is Invalid

Respondent argues that Petitioner is incorrect in maintaining that only §2255 grants a court the authority to vacate a conviction and modify a sentence. See 28 U.S.C. §2255(a) (Supp. III 2009) (stating that court may "vacate, set aside or correct the sentence"). Generally, Respondent argues that §2243 gives broad discretion to federal courts to dispose of a habeas petition under Section 2241 "as law and justice require." Opp. 10.

However, all the cases cited by Respondent, in which courts invoked habeas authority, were cases in which federal courts discussed remedies in broad language, were early cases before §2255 became law, were actually §2254 cases, were §2241 cases that only challenged custody rather than conviction or sentence, or were §2241 cases that responded to actual challenges to a conviction or sentence through the §2255(e) savings clause.

None of these cases implies, let alone holds,

that a district court has broad authority under §2241 to set aside a long-final conviction or sentence simply because the district court believes it would be a contribution to justice. And none of these cases implies, let alone holds, that a habeas court under may reopen a judgment that never challenged by the §2241 habeas petitioner..

As Respondent concedes, Petitioner has never challenged either the imposition of his conviction or his sentence and properly filed his petition pursuant to §2241 to challenge his detention rather than the judgment of conviction and sentence. Opp. 9. Thus, the question is whether a habeas court in a §2241 proceeding may reopen a final judgment that has never been challenged by the petitioner.

Hilton v. Braunskill, 481 U.S. 770 (1987), for example, concerned only the broad power of a court to stay its own order, not to attack a judgment of conviction.

In re Bonner, 151 U.S. 242 (1894), involved a habeas corpus challenge to the imposition of sentence and commitment of a prisoner and was decided long before adoption of 28 U.S.C. § 2255 provided the remedy for a federal prisoner attacking his sentence.

Carafas v. LaVallee, 391 U.S. 234 (1968), addressed the question whether a petitioner who had been in state custody remained "in custody" for purposes of 28 U.S.C. §2254 after his sentence

was completed because his past conviction continued to harm his business and personal life. *Peyton v. Rowe*, 391 U.S. 54 (1968) is another §2254 case in which the Court addressed the "in custody" requirement of federal habeas corpus and found that a petitioner was "in custody" if the claim involved a future consecutive sentence.

Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991), dealt with a state prisoner's § 2254 habeas petition (not §2241), attacking his convictions and sentences as a result of post-trial delay.

Bryant v. United States, 214 F. 51 (8th Cir. 1914), a pre §2255 case, involved a prisoner who challenged the sentence imposed upon him as unauthorized by law. *United States v. Pridgeon*, 153 U.S. 48 (1894), another pre §2255 case, was an action by a federal defendant challenging both his conviction and sentence.

Boumediene v. Bush, 553 U.S. 723 (2008) has already been distinguished by Petitioner (Pet. 20-21), and involved the power of a court to correct errors in the government's decision to hold a person – the exclusive role of § 2241.

Respondent cites a number of cases in support of his argument that §2241 may be used to challenge the imposition of his conviction and sentence under the §2255(e) savings clause when §2255 is "inadequate or ineffective." Opp. 11-12. In *United States* v. *Triestman*, 178 F.3d 624, 629 (2d Cir. 1999), a habeas petitioner was allowed to

challenged his conviction and sentence under §2241 when that court found that a procedurally barred §2255 was inadequate and ineffective because petitioner's claim involved a constitutional defect. As Petitioner has pointed out (Pet. 18 n.4), all other circuits, including the 11th Circuit, have rejected *Triestman* as too broad and have limited the savings clause to where a petitioner can show actual innocence and retroactivity. *Reyes-Requena v. United States*, 243 F.3d 893, 903 (5th Cir. 2001) (collecting cases); *Wofford v Scott*, 177 F.3d 1236, 1243 (11th Circuit 1999).

Respondent argues that the cases relied upon by Petitioner merely stand for the proposition that defendants challenging their convictions or sentences must "ordinarily" use §2255, less §2241 be used to circumvent the procedural limitations on §2255. Opp. 12. In fact, the cases cited by Petitioner (Pet. 14-18) explicitly state that challenging the conviction or sentence is the "exclusive remedy" of §2255, except in very rare cases where the savings clause of §2255(e) is used. *Antonelli v. Warden*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008). Further, "[a] prisoner in custody pursuant to a federal court judgment may proceed under §2241 only when he raises claims outside the scope of §2255(a), *that is, claims concerning execution of his sentence*" (emphasis added). Id.,

citing *Darby v. Hawk-Sawyer*, 405 F.3d 942, 945 (11th Cir. 2005).[1]

II

The Reality in This Case is That the United States Assured Austria that if Austria Denied Extradition on One Count, A Federal Court Would Be Required to Conduct a Re-Sentencing for Petitioner and that the Re-Sentencing Would Restore Petitioner's Right to Appeal, and the United States Was Unable Fulfill its Assurances to Austria

The United States assured Austria in its February 8, 2002 letter to the Austrian Ministry of Justice that, if extradition were denied on at least one count, the United States would file a motion seeking a re-sentencing in the district court and maintain that the re-sentencing is required, appropriate, and sufficient to provide a full right of appeal. Pet. App. 98.

In its May 14, 2002 letter to the Austrian Ministry of Justice, the United States assured Austria that, if extradition was denied for offenses involving false statements, "the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition" and "this would result in Weiss being permitted to file a full appeal on all issues." Pet. App. 95.

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[1] As already noted (Pet. 15), it is because §2241 is not used to challenge the conviction or sentence that Congress exempted it from the gate keeping requirements of the Antiterrorism and Effective Death Penalty Act of 1996.

Based on these binding assurances, which Austria relied upon when presenting them to its own courts, the European Human Rights Court, and the United Nations Human Rights Committee (Pet. 9-10), Austria extradited Petitioner to the United States.[2] The United States was unable to obtain a re-sentencing, as it assured Austria it would.

Petitioner then filed his habeas corpus petition under §2241. He did not challenge his conviction or his sentence. Instead, (standing in the shoes of Austria), he claimed his custody was in violation of the extradition treaty and terms of extradition, and sought a remedy of either release or return to Austria, the appropriate remedy under §2241.

The district court denied this remedy and instead directed petitioner to request that the court re-sentence him by striking the sentence on count 93 for which extradition was denied. Petitioner complied, although at all times he made clear that he was not challenging the conviction or the imposition of any part of his sentence in his habeas petition.

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[2] See Austrian diplomatic note (Pet. App. 92). Respondent notes in its facts that the lower Austrian court authorized extradition, but does not note the exclusive power of the Austrian Minister of Justice to deny extradition on the issue of the right of appeal, which he did on May 10, 2002 to obtain the further assurances given on May 14, 2002. See Pet. 9-11.

Despite the fact that Petitioner made no claim of any deficiency in his judgment, the district court ruled that it could undo his final judgment in order to find some way for the United States to fulfill the binding assurances it gave Austria.

Petitioner submits that there is no law – certainly none cited by Respondent – that permits a district court to set aside a long-final judgment in a criminal case, or to reinstate an appeal long ago dismissed with prejudice, in an effort to assist the Executive in fulfilling assurances that it knew or should have known could not be kept.

III

The District Court Found, and the Court of Appeals Affirmed, that the United States Communications Created Obligations Regarding the Rule of Specialty

Respondent argues that the district court found that any United States' communications given to Austria were immaterial to the United States obligations under the rule of specialty. Opp at 6, 9, 14. This is a misreading of the decisions below. [3]

Although the district court rejected Petitioner's claim that the United States was obligated to provide a full re-sentencing, the

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[3] See generally 11th Circuit Opinion of April 20, 2010 (Pet. App. 1-5); district court *Order on all Pending Matters* of July 16, 2009 (App. 6-13); district court *Memorandum Opinion* of December 15, 2008 (Pet. App. 14-45).

district court found that the United States communications obligated the United States to provide a full appeal of his conviction and sentence to fulfill the rule of specialty:

> ...it is the intention of the Court through reentry of the judgment to revive the Petitioner's right of appeal in compliance with the rule of specialty...

District Court Order, Pet. App. 8-9

Specifically, Respondent argues that the district court rejected Petitioner's claim that the United States' communications about "the procedural device that would result in obedience to the rule of specialty" constituted conditions on petitioner's extradition or were material to the United States' compliance with the rule of specialty. Opp. at 6, quoting from the district court's *Memorandum Opinion*, Pet. App. 36. The above quote is taken out of context.

In his habeas proceedings, Petitioner claimed that the United States made misrepresentations of procedural law to Austria. The district court found that, indeed, the assurance the United States gave Austria that the presiding judge would be required to re-sentence Petitioner was wrong. However, the district court also found:

> If there was a misrepresentation concerning the nature of the procedural device that would result in obedience to

> the rule of specialty, it simply does not matter, in so far as the Treaty obligations are concerned (as distinguished from the possible disciplinary inquiries) as long as the rule of specialty is honored in the end.

Pet. App. 36.

The crucial phrase ignored by the Respondent is "as long as the rule of specialty is honored in the end." On the issue on how to honor the rule of specialty, the district court, relying on the United States communications and the June 18, 2008 diplomatic note from Austria, found that it required both:

> (1) elimination of any criminal sanction as to Count Ninety Three; and (2) a resulting plenary appeal from the judgment as a whole.

Pet. App. at 37.

In affirming, the 11th Circuit stated:

> The district court found that the communications by the United States required only the elimination of Count 93 and a full appeal of his conviction and the new sentence without Count 93. This, the district court found, would fulfill the obligations of the United States under the rule of specialty.

Pet. App. at 3-4.

The Court of Appeals noted the government's opposing argument that the United States Communications were not conditions, but stated that it would not address this argument (resurrected by the Solicitor General in its Opp.) because the government did not cross-appeal. Pet. App 4, n.4.

IV

It is Important for this Court to Decide What Remedy is Required Where the United States Provides Binding Assurances to Another Nation to Obtain Extradition and Cannot Fulfill those Assurances

Petitioner relies upon *Johnson* v. *Browne*, 205 U.S. 309 (1907), for the proposition that where an individual has been extradited to the United States as a result of binding assurances provided to the extraditing nation and the United States cannot fulfill its commitment to the extraditing nation which continues to insist upon fulfillment, the remedy is to release the individual or to return the individual to the extraditing country.

Respondent argues (Opp. 16) that compliance with the United States' obligations to Austria "did not require petitioner's complete release" and that "as the district court pointed out (Pet. App. 39-40), it would be inappropriate to grant more relief than necessary to avoid a violation of the Treaty."

The problem with Respondent's argument is that it rests upon the unsupported argument, discussed above, that a district court may simply reopen a criminal judgment and modify it as it pleases in order to help the United States fulfill assurances even though there is no constitutional defect or showing of actual innocence. This argument plays fast and loose with the basic principle that federal jurisdiction is limited and federal courts must comply with the rule of law. As noted above, Respondent cites no authority to support the notion that a federal court can modify a final judgment in a criminal case that is valid on its face and not alleged to be deficient in any way simply because it might make it easier for the United States to meet obligations that it voluntarily assumed vis-à-vis foreign nations.

Respondent's argument is the antithesis of adherence to a rule of law. It would permit a federal court to modify a final criminal judgment that is valid in every respect under American law and reinstate an appeal denied with prejudice for over a decade simply because the Executive made a promise to another country. If this is so, the Executive has the power to modify all judicial judgments and to ignore all limits on judicial jurisdiction simply by making commitments to foreign states that are not authorized by United States law. A more dangerous assault on the rule of law is difficult to fathom.

V

Austria Was Promised That Petitioner Would Receive a Full Re-Sentencing

Petitioner agrees with Respondent that, ordinarily, Petitioner's claim regarding a full re-sentencing – that the lower court was incorrect that the United States was only obligated to vacate count 93 – would not present the type of issue that this Court would review. But, this is no ordinary case.

As discussed above, the district court exercised jurisdiction beyond what has been done before in a habeas case in an attempt to avoid having to hold that Petitioner was detained in violation of the extradition treaty. The district court was at pains to fulfill the assurances that the United States gave to Austria, and the district court could find no authority for a full re-sentencing. It therefore distorted the assurances for a full re-sentencing to appear to support only the striking of one count and accompanying sentence (leaving Petitioner with an unprecedented 835-year sentence in violation of United States' assurances).

The United States assured Austria in its February 8, 2002 letter (Pet. App. 98) that, if extradition were denied on one or more counts, the district court would "re-sentence Mr. Weiss, considering only those Counts of the conviction for which he is extradited from Austria." This was an

assurance of a full re-sentencing on all counts for which extradition was granted. [4]

Further, as Petitioner argued (Pet. 34), when the district court ordered the vacating of count 93, it was also required to do a full re-sentencing under *United States v. Booker* 543 U.S. 220 (2005), considering all factors under 18 U.S.C. §3553(a). This would include all relevant post-sentencing evidence such as rehabilitation. *Pepper v. United States* __U.S. __(2010).

Respondent's suggestion that Petitioner may bring this argument in his direct appeal overlooks the fact that the district court vacated count 93 to fulfill treaty obligations and the issue of treaty obligations is what is now before this Court. [5]

CONCLUSION

Petitioner respectfully submits – for the reasons stated in his Petition and in this Reply – that the question whether a district court may set

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[4] Under the rule of specialty (in light of the US communications), Petitioner may only be punished on those counts that have been re-sentenced with a right to a full appeal, and absent a re-sentencing and right to a full appeal he remains in custody in violation of the treaty. Pet. 28, 29.

[5] Almost nine years ago, in an attempt to fulfill their assurance to Austria, the government made two motions for a full re-sentencing that were denied for lack of authority. If this Court now finds authority for this right to be granted, it should certainly be given without delay to honor the treaty obligations.

aside a valid conviction and sentence in a habeas corpus proceeding brought pursuant to § 2241 when the petitioner does not challenge the imposed conviction, sentence or judgment is a serious one.

Petitioner also submits that the question whether a district court can afford extraordinary relief under §2241 or §2243 in order to prevent the Executive from reneging on assurances made to another Nation is equally important.

It is not the place of federal courts to try to stretch jurisdictional statutes and procedural rules to save the Executive from its own excesses, which is what happened in this case. The limits of courts to modify their judgments are imposed by law and must be respected, and those limits may not be exceeded to avoid exposure of the reality that the United States made assurances to another Nation that it is unable to keep.

Petitioner further respectfully submits that the question of what remedy is required when an extradition is obtained by false pretenses is worthy of this Court's consideration. The Court's last word on this was *Johnson* v. *Browne*, 205 U.S. 309 (1907), and it is important to know whether or not a genuine remedy for a violation of extradition treaty assurances is still required by American law.

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